JD(ATL)–37–03
Palestine, TX
Jacksonville, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

WAL–MART STORES, INC.

and **CASE 16–CA–20391–001–0**

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 455

and

WALBMART STORES, INC.

and **CASES 16–CA–20603–001–0**
16–CA–20837–001–0

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 540

and

WALBMART STORES, INC.
Employer

and **CASE 16–RC–10181–001–0**

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 455
Petitioner

Edward B. Valverde, Esq.,
for the General Counsel
George Wiszynski, Esq.,
of Washington, D.C.,
for the Charging Party
J. Richard Hammett, Esq.,
Laurence E. Stuart, Esq. and
Charlene H. Tsang, Esq.
(Baker & McKenzie),
of Houston, Texas, for the Respondent

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: In this case, a recently certified unit of meat department employees became inappropriate when the Respondent lawfully eliminating meatcutting and began selling only case–ready meat. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the certified Union before the unit became inappropriate, by refusing to bargain with the Union concerning the effects of the change, and by refusing to furnish the Union with requested relevant and necessary information. However, Respondent did not otherwise violate the Act.

Procedural History

For efficiency, unfair labor practice charges concerning two different Wal–Mart Supercenters have been consolidated, along with a representation case, into this one proceeding. The allegations involve two essentially separate sets of facts, one concerning events at a store in Palestine Texas, and the other concerning events at a store in Jacksonville, Texas. The procedural histories of these two matters will be discussed separately.

Palestine, Texas Store (Cases 16–RC–10181 and 16–CA–20391)

On February 15, 2000, United Food and Commercial Workers Union, Local 455 filed a petition in Case 16–RC–10181. (This petitioner will be referred to as "Local 455" or, when context precludes the possibility of confusion, simply as the "Union.") Local 455 sought to represent the following unit of Wal–Mart employees:

> All full–time and regular part–time employees employed in the meat and seafood market at its store located at 2223 South Loop 256, Palestine, Texas 75801; excluding the meat and seafood market manager, office clerical employees, professional employees, guards and supervisors within the meaning of the Act.

On April 12, 2000, the Board conducted an election at the Palestine, Texas store. Eligible to vote were all full–time and regular part–time employees employed in the meat market area and seafood department. After a stipulation resolved all challenged ballots, a revised tally of ballots indicated that Local 455 lost the election by a vote of 6 to 5.

On May 5, 2000, Local 455 filed Petitioner's Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election in Case 16–RC–10181. (As discussed further below, the issues raised by these Objections became part of the present proceeding by a consolidation order dated October 15, 2002.)

Also on May 5, 2000, the United Food and Commercial Workers International Union, AFL–CIO, CLC ("UFCW" or "International Union") filed an unfair labor practice charge against Respondent in Case 16–CA–20391. This charge, concerning preelection conduct at the Palestine, Texas Wal–Mart store, alleged violations of Section 8(a)(1) and (3) of the Act.

The General Counsel did not issue a separate complaint concerning the allegations arising out of the charge in Case 16–CA–20391. Rather, such allegations do appear in an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, dated August 26, 2002, in Cases 16–CA–20391, 16–CA–20603 and 16–CA–20827, discussed further below.

Jacksonville, Texas Store (Cases 16–CA–20603 and 16–CA–20827)

On February 17, 2000, in Case 16–RC–10168 (not a part of the current proceeding), the Board conducted an election at Respondent's store in Jacksonville, Texas, to determine whether a majority of meat department employees desired to be represented by United Food and Commercial Workers Union, Local 540 ("Local 540" or, where context allows, the "Union"). A majority voted in favor of such representation.

On March 13, 2000, Local 540 demanded bargaining over Respondent's decision to eliminate meatcutting and use only case–ready meat.

On March 14, 2000, Respondent refused to recognize and bargain with the Union. Local 540 made further demands for recognition and bargaining, which are discussed more fully below. Respondent did not, and has not, recognized or bargained with the Union.

On April 21, 2000, a hearing officer recommended that the Respondent's objections to the election be overruled. Respondent appealed this decision to the Board.

On August 9, 2000, the Board issued a Decision and Certification of Representative which certified Local 540 to be the exclusive bargaining representative of all full–time and regular part–time employees employed in the meat department at Respondent's Jacksonville, Texas store.

On August 21, 2000, United Food and Commercial Workers Union, Local 540 filed an unfair labor practice charge against Respondent in Case 16–CA–20603. This charge alleged that Respondent had refused to bargain in good faith with Local 540 concerning the terms and conditions of employment of the meat department employees at Respondent's Jacksonville, Texas store.

On August 22, 2000, the General Counsel, through the Regional Director for Region 16 of the Board, issued a Complaint in Case 16–CA–20603. This Complaint alleged that pursuant to the Board's August 9, 2000 Decision and Certification of Representative, Local 540 was the exclusive bargaining representative of a unit of meat department employees at Respondent's Jacksonville, Texas, store; that on August 16, 2000, Local 540 requested that Respondent engage in collective bargaining, and also that Respondent furnish certain information pertaining to the bargaining unit employees. It further alleged that Respondent had failed and refused to recognize and bargain with the Union, and also had failed and refused to furnish the requested information, in violation of Section 8(a)(5) and (1) of the Act.

On September 1, 2000, Respondent filed a timely Answer to the Complaint in Case 16–CA–20603.

On September 8, 2000, in Case 16–CA–20603, the General Counsel filed a Motion to Transfer and Continue Case Before the Board and Motion for Summary Judgment.

On December 6, 2000, Local 540 filed an unfair labor practice charge in Case 16–CA–20827, alleging that Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 540 over the decision and effects of its plan to eliminate meat cutting at its Jacksonville, Texas store and instead to sell case–ready meat.

The Consolidated Proceeding

On August 26, 2002, the General Counsel, by the Regional Director for Region 16 of the Board, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 16–CA–20391, 16–CA–20603 and 16–CA–20827. For simplicity, this document will be called the "Complaint" or "Consolidated Complaint."

On September 9, 2002, Respondent filed an Answer and Affirmative Defenses to Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 16–CA–20391, 16–CA–20603, and 16–CA–20827.

On October 15, 2002, the General Counsel, by the Regional Director for Region 16 of the Board, issued an Order Directing Hearing, Second Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 16–CA–20391, 16–CA–20603, 16–CA–20827 and 16–RC–10181. Although the caption of this pleading might suggest that it included an unfair labor practice complaint, it did not repeat or amend the allegations raised by the August 26, 2002 Order Consolidating Cases, Complaint and Notice of Hearing. It did, however, consolidate the representation case, 16–RC–10181, with the unfair labor practice cases, Cases 16–CA–20391, 16–CA–20603, and 16–CA–20827.

On October 28, 2002, Respondent filed an Answer and Affirmative Defenses to Order Directing Hearing, Second Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 16–CA–20391, 16–CA–20603, 16–CA–20827 and 16–RC–10181.

The hearing in this matter opened before me in Tyler, Texas on November 18, 2002. The parties presented evidence on November 18 through November 22, 2002, and on this latter date, the hearing closed. Counsel submitted post–hearing briefs, which I have considered.

Certain typographical errors appear in the transcript. However, no party has moved to correct the transcript, so in Appendix B to this Decision, I note and correct only those mistakes which seem obvious and noncontroversial.

Admitted Allegations

Based on the admissions in Respondent's Answer, I find that the unfair labor practice charges were filed and served as alleged in Complaint paragraphs 1(a), 1(b) and 1(c).

Additionally, based on Respondent's admissions, I find that Respondent has been, at all material times, a Delaware corporation with retail stores in Jacksonville and Palestine, Texas, as alleged in Complaint paragraph 2, that it meets the commerce standard set forth in Complaint paragraph 3, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, as alleged in Complaint paragraph 4. Therefore, I conclude that Respondent is subject to the Board's jurisdiction.

In accordance with Respondent's admission, I find that the United Food and Commercial Workers Union, AFL–CIO, CLC, its Local 455 and its Local 540, are labor organizations within the meaning of Section 2(5) of the Act.

Based on the admission in Respondent's Answer, I find that Ron McCall, store manager at Respondent's Jacksonville, Texas facility, is Respondent's supervisor and agent within the meaning of Sections 2(11) and 2(13) of the Act, respectively. Based on a stipulation of the parties during the hearing, I find that Ray Brown is Respondent's supervisor within the meaning of Section 2(11) of the Act.

Respondent's Answer admits the allegations set forth in Complaint paragraph 13. Based on that admission, I find that on about August 16, 2000, the Union, by letter and facsimile, requested that Respondent furnish the Union with the following information:

> (a) A list of all current employees in the meat market bargaining unit, including all meat processors, meat associates and meat market cleaners, along with their dates of hire, rates of pay, job classification, last known home address and telephone number;
>
> (b) Copies of all personnel policies and work rules that apply to bargaining unit employees;
>
> (c) Copies of all payroll and wage policies that apply to the bargaining unit employees;
>
> (d) Copies of all documents describing available fringe benefits, such as pension, profit sharing, 401(k) plans, vacation and health insurance that apply to the bargaining unit employees;
>
> (e) Copies of all bargaining unit job descriptions.

Respondent's Answer admits some but not all the allegations set forth in Complaint paragraphs 15 and 16. Based on these partial admissions, I find that Respondent has not bargained with Local 540 at any time before or after August 21, 2000, and that it has not furnished the information requested by the Union in its August 16, 2000 letter, described above.

Respondent's Answer also admits some of the allegations described in Complaint paragraphs 17 and 18. Specifically, Respondent admits that by July 18, 2000 letter, the Union requested to bargain over Respondent's change to case–ready meat, and that, by letters dated July 19 and August 21, 2000, Respondent notified the Union that it would not bargain over the effects of its implementation of its case–ready meat program.

Withdrawn Allegations

After the close of the hearing in this matter, the General Counsel filed a "Motion to Withdraw Section 8(a)(1) Allegations From the Consolidated Complaint" dated January 6, 2003. That unopposed motion, which is hereby granted, stated in pertinent part as follows:

> Counsel for the General Counsel has identified certain allegations that it requests to be withdrawn. Those allegations include: paragraphs 7(e), 7(f), 7(g), 7(h), 7(i), 7(j) and 7(k). Also, the following portions of the following paragraphs are requested to be withdrawn:
>
> - That portion of paragraph 7(b) that alleges Stan Ellis interrogated employees about the Union.
> - That portion of paragraph 7(c) that alleges Tom Underwood interrogated an employee about the Union activities of other employees.
> - That portion of paragraph 7(d) that alleges Tom Underwood solicited grievances from employees.
>
> This request does not affect the remaining portions of paragraphs 7(b), (c) and (d) which remain before the Administrative Law Judge for decision.

Having granted the General Counsel's motion, I recommend that the Board dismiss the allegations raised by Complaint paragraphs 7(e), 7(f), 7(g), 7(h), 7(i), 7(j) and 7(k). Because the General Counsel's motion has not withdrawn all allegations in Complaint paragraphs 7(b), 7(c) and 7(d), I will discuss the remaining allegations below.

Disputed Allegations

This consolidated proceeding concerns two different sets of facts. The first pertains to Local 455's organizing campaign at Respondent's Supercenter in Palestine, Texas and the events leading up to an election at that facility on April 12, 2000. The General Counsel contends that Respondent interfered with the union's effort by acts described in the various subparagraphs of Complaint paragraph 7. The Complaint alleges that this conduct violated Section 8(a)(1) of the Act.

The General Counsel also contends that during this organizing campaign, Respondent discriminated in regard to terms and conditions of employment to discourage membership in the Union. The subparagraphs of Complaint paragraph 8 itemize such alleged acts which, the government asserts, violate Section 8(a)(3) as well as Section 8(a)(1).

In the April 12, 2000 election at the Palestine store, Local 455 did not receive a majority of the votes and filed objections to the conduct of the election. The alleged violations of Section 8(a)(1) and (3) provide the basis for these objections.

The second set of facts involves Respondent's Supercenter in Jacksonville, Texas. Although the allegations pertaining to the Palestine store concern pre–election conduct, the Jacksonville issues largely concern post–election matters, notably, Respondent's refusal to recognize and bargain with Local 540 after it won an election which the Board conducted on February 17, 2000. Before discussing the Jacksonville allegations, I will examine first those involving the Palestine store.

1. Respondent's Palestine, Texas Facility

Complaint Paragraphs 7(a) and 8(a)

These complaint paragraphs concern alleged "unit packing." As described above, the Union filed a representation petition on February 15, 2000, seeking an election in a meat department unit. Allegedly, Respondent transferred three employees into the meat department to dilute the Union's strength.

Complaint paragraphs 7(a) and 8(a) refer to the same alleged event, the transfer of these three employees into the meat department at Respondent's Palestine, Texas store. When considered together with the Complaint's conclusionary paragraphs, Complaint paragraph 7(a) alleges that these transfers violate Section 8(a)(1) of the Act, and Complaint paragraph 8(a) alleges that the transfers violate Section 8(a)(3).

It appears that the Complaint originally identified the wrong employees as having been transferred into the meat department. At hearing, the General Counsel amended the relevant Complaint paragraphs to delete the original three names and to allege instead that, about February 14, 2000, Respondent transferred Justin McCreary, John E. Warner and Martin Huddleston into the meat department. Respondent denies that it transferred any employees into the meat department for an unlawful purpose.

In January and February 2000, Ronald Stacy was manager of Respondent's Palestine, Texas store. He testified that in mid–January 2000, he needed to fill two positions in the store's meat department. According to Stacy, one of these positions became open because an employee with performance problems had been transferred to another department. The other position opened when the employee occupying it quit.

Personnel records, corroborating Stacy's testimony, establish that on February 5, 2000, Respondent transferred Warner and Huddleston into the meat department. Before becoming a meat sales associate, Warner held the job classification of grocery sales associate. At the time of his transfer, Huddleston had been working as a grocery stocker. The transfers did not affect the pay of either Warner or Huddleston.

Respondent's personnel records also document the transfer of Justin McCreary from a position as "cart pusher" to meat clerk. Although the store manager approved the transfer on

February 19, 2000, it appears that the transfer itself took effect two weeks earlier, on February 5, 2000.

Based on Stacy's testimony, which I credit, I find that Respondent transferred Warner and Huddleston into the meat department on February 5, 2000 to file two vacancies. Moreover, notwithstanding that the store manager signed a document approving McCreary's transfer two weeks after the effective date of the transfer, the record does not afford a basis to conclude that the transfer actually occurred on a date later than February 5, 2000. Rather, the difference between the transfer date and the approval date appears attributable to the type of "paperwork lag" not uncommon in large organizations. I find that McCreary also began work in the meat department on February 5, 2000.

No improper motivation or objective may be inferred simply from the transfers themselves. Such transfers occur in all businesses and, considering the typical employee turnover in the discount retailing industry, the reassignment of a sales associate, in and of itself, appears unremarkable. In some circumstances, other evidence can cast a shadow over the legitimacy of such a transfer, but such evidence does not appear in the present record.

Warner, Huddleston and McCreary did not testify. No evidence indicates that Respondent questioned any of them concerning their union activities or sympathies. Similarly, the record does not establish that Respondent questioned any other employees concerning the union activities or sympathies of Warner, Huddleston and McCreary either before or after their transfers into the meat department. Moreover, the record provides no basis to conclude that members of management either knew, or held any opinions about the attitudes of these three employees towards unionization.

These three transfers took place 10 days before the Local 455 filed the representation petition. The evidence does not support a finding that in deciding to reassign these three employees to the meat department, management considered what effect those transfers would have on the union's chances for success. I conclude that Respondent made these transfers solely for business considerations relating to the staffing needs of the meat department.

The government has alleged that the transfers interfered with, restrained and coerced employees in the exercise of protected rights in violation of Section 8(a)(1) of the Act and constituted discrimination in regard to a term or condition of employment in violation of Section 8(a)(3) as well. The record does not establish that the transfer of these employees into the meat department interfered with any employee's right to engage in protected activity. Therefore, I recommend that the Board dismiss the 8(a)(1) allegations raised by Complaint paragraphs 7(a) and 19.

Complaint paragraph 20 alleges a separate theory of violation, namely, that by transferring the three employees into the meat department, Respondent "has been discriminating in regard to the hire or tenure or terms of conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) of the Act. . ."

In deciding whether the transfers violated Section 8(a)(3), I will analyze the facts under the framework which the Board established in ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Such a framework is not appropriate for every case alleging a Section 8(a)(3) violation. For example, in *Phoenix Transit System*, 337 NLRB No. 78 (May 10, 2002), the respondent admitted discharging an employee for certain activity and the lawfulness of this action depended on the extent to which the labor law protected such activity.

In the present case, however, the facts do not eliminate the issue of motivation. Respondent has not admitted any intent to discriminate and the General Counsel bears the burden of establishing such intent by a preponderance of the evidence. It is appropriate to follow the *Wright Line* framework to determine whether the government has carried this burden.

Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

The General Counsel has not established the first ***Wright Line*** element. As stated above, the alleged discriminatees, Warner, Huddleston and McCreary, did not testify. No other evidence establishes that they engaged in union or other protected concerted activities. Because the General Counsel has not proven this essential element, the inquiry may terminate at this point. However, it may be noted that the government also has failed to satisfy the other *Wright Line* criteria.

At the second step, ***Wright Line*** requires the General Counsel to prove that a respondent knew about the protected activities which satisfied the first step. The government might satisfy this requirement by showing that a respondent erroneously believed that an employee had engaged in protected activities. In this case, however, the evidence establishes neither knowledge of protected activities nor an erroneous belief that the alleged discriminatees had engaged in such activities. Therefore, the government has failed to satisfy the second *Wright Line* criterion.

More fundamentally, the evidence fails to establish the third *Wright Line* requirement, that one or more employees suffered an adverse employment action. The transfer did not change the wages or benefits of any of the alleged discriminatees. Moreover, the record indicates that at least one of them, "cart pusher" McCreary, sought a transfer from a job in the parking lot to a more comfortable assignment inside the store.

Finally, the evidence fails to satisfy the fourth ***Wright Line*** requirement. Because the record fails to establish either the existence of protected activities or of any adverse employment action, it necessarily falls short of proving a link between them.

For these reasons, I recommend that the Board dismiss the allegations raised by Complaint paragraphs 8(a) and 20.

Complaint Paragraph 7(b)

Complaint paragraph 7(b) originally alleged that Respondent, by Kelly Clifton and Stan Ellis at its Palestine, Texas facility, interrogated employees about the union during the period February 15 through April 12, 2000. After the hearing, the General Counsel withdrew the allegation that Stan Ellis interrogated employees

The remaining allegation in paragraph 7(b) concerns Kelly Clifton, a food merchandiser. Respondent has denied that Clifton is its supervisor and agent within the meaning of Section 2(11) and 2(13) of the Act, respectively. At a minimum, the record establishes that Clifton possessed considerable authority concerning the purchase and display of food products. In his own testimony, Clifton referred to his participation in the process of "management by walking around." I find that Respondent had authorized Clifton to act as its agent within the meaning of Section 2(13) of the Act. Further, I conclude that statements made by Clifton to Respondent's employees concerning work–related matters are attributable to Respondent.

To establish the allegations in Complaint paragraph 7(b), the government relies on the testimony of Rocky Gambill, employed by Respondent as a lead associate in the Palestine store's meat department. Gambill testified that "on several occasions," a food merchandiser "asked how I felt about the union organization, and how I felt about the Union itself." Gambill testified that he replied that he was neither for nor against the Union. The food merchandiser, Kelly Clifton, admitted that he and Gambill discussed the Union, but denied "going up to" Gambill and asking how he felt about it.

The vagueness of Gambill's testimony diminishes its impact. Although he asserted that Clifton asked him "on several occasions" how he felt about the Union, Gambill did not identify even one of those occasions specifically. He did not point to any particular conversation on any particular date. Likewise, he did not describe where any of the asserted conversations took place or indicate whether anyone else had been close enough to hear what was said. Moreover, Gambill did not recount how the subject of the Union arose during these conversations.

Just as the presence of such details gives testimony the ring of truth, their absence raises doubts. Gambill's testimony lacks such authenticating detail, and I give it little weight. Crediting Clifton, I find that he did not interrogate Gambill as alleged in Complaint paragraph 7(b). Therefore, I recommend that the Board dismiss this allegation.

Complaint Paragraph 7(c)

Complaint paragraph 7(c) originally alleged that Respondent, by Kelly Clifton and Tom Underwood, interrogated an employee at the Palestine store about the union activities of other employees during the time period February 15 through April 12, 2000. After the hearing, the General Counsel withdrew the allegation that Underwood engaged in such interrogations.

Although the remaining portion of Complaint paragraph 7(c) alleges that Kelly Clifton interrogated an employee about other workers' union activities, credible evidence does not support this allegation. Therefore, I recommend that the Board dismiss Complaint paragraph 7(c).

Complaints Paragraphs 7(d), 7(m) and 8(b)

Complaint paragraph 7(d) originally alleged that Respondent, by Kelly Clifton and Tom Underwood, solicited grievances from employees at the Palestine store. After the hearing, the General Counsel withdrew the allegation that Underwood solicited grievances, but did not withdraw the allegation that Kelly Clifton solicited grievances.

Complaint paragraph 7(m) alleges that during the period February 15 through April 15, 2000, Respondent, by various officials, "solicited grievances from market employees." Complaint paragraph 19 alleges that the conduct described in Complaint paragraphs 7(d) and 7(m) violated Section 8(a)(1) of the Act. Respondent has denied these allegations.

Complaint paragraph 8(b) alleges that during the period February 15 through April 12, 2000, Respondent granted the following "benefits" to its meat market employees: (1) Added a refrigerator, microwave and speakers to the break room; (2) added a coat cabinet in the market; (3) purchased new knives and sharpener; and (4) repaired the drain in the market. Complaint paragraph 19 alleges that this "grant of benefits" violated Section 8(a)(1) and Complaint paragraph 20 alleges that it violated Section 8(a)(3). Respondent denies these allegations.

In sum, Complaint paragraph 7(d) alleges that Respondent's managers asked employees if they had any complaints about working conditions and Complaint paragraph 8(b) alleges that Respondent, acting on this information, made improvements. The government contends that these actions, taken after the Union filed its representation petition and before the election, constituted unfair labor practices.

Before discussing the evidence, it may be helpful to state as precisely as possible what does, and what does not, constitute an unlawful solicitation of grievances. In very general terms, the law recognizes that employers may try to counter a union organizing drive either by using a "stick," such as threats of retaliation, or by using a "carrot," the promise of benefits. The law proscribes both tactics. Thus, even though Section 8(c) of the Act recognizes an employer's right to express its views to employees in noncoercive speech, an employer has no right to make a "threat of reprisal or force or promise of benefit."

Board precedents establish that such a promise of benefits does not have to be explicit to be unlawful. Under some circumstances, when a manager asks an employee to identify problems

related to working conditions, the question itself may imply that the manager will act favorably on the employee's response. Such an invitation to discuss problems may be tantamount to a promise to remedy them. If made during a union organizing campaign, such an implied promise may violate Section 8(a)(1). Stated another way, if a question about working conditions really constitutes a promise of benefit, then such a promise takes the question outside the protection of Section 8(c).

Obviously, in all industries, supervisors and managers ask employees questions about working conditions all the time. Doing so is an essential part of supervision. Normally, employees would not understand such questions to be veiled promises that they will gain some benefit if they vote against a union. Reasonably, employees only would infer such a *quid pro quo* during a union organizing drive. Moreover, even during an organizing drive, employees reasonably would not regard a question to be such a promise if, before the organizing drive began, management routinely asked similar questions for legitimate purposes.

In ***Laboratory Corporation of America Holdings***, 333 NLRB No. 38 (February 13, 2001), the Board reversed an administrative law judge's decision that a corporate vice president had not unlawfully solicited grievances when the official met with a known union supporter to find out if she was unhappy and "to see if he couldn't help change things." The vice president granted the employee's request for a longer lunch break and said he would look into another matter the employee had raised.

The judge found the vice president's comments too ambiguous to violate Section 8(a)(1). Reversing that holding, the Board noted that Respondent had failed to show that it had a practice, in existence before the union organizing campaign, of holding meetings with employees to solicit grievances. Quoting ***Maple Grove Health Care Center***, 330 NLRB No. 121, slip op. at 1 (2000), the Board set out the relevant principles:

> Absent a previous practice of doing so ... the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. [I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation. [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is a rebuttable one.

However, not every solicitous remark constitutes an unlawful solicitation of grievances. In ***EFCO Corporation***, 327 NLRB 372 (1998), employees came to the respondent's president to discuss working conditions. The president met with the employees pursuant to the company's "open door" policy. Reversing its administrative law judge, the Board held that "an employer does not unlawfully solicit grievances where, as here, employees on their own accord approach management to discuss problems, and a fortiori where, as here, the employer maintained a prior open door policy and there is no evidence that any promises were made to employees." See also ***Flamingo Hilton–Laughlin***, 324 NLRB 72 (1997).

In the present case, the government alleges that Respondent's merchandiser, Kelly Clifton, solicited grievances. The government also alleges that other officials, identified only as among those alleged to be supervisors in Complaint paragraph 6(b), also solicited grievances. However, the record does not establish any specific conversation, like that described in ***Laboratory Corporation of America Holdings***, in which a supervisor asked any question which would reasonably be understood as an implied promise.

As the Board stated in ***Laboratory Corporation of America Holdings***, it "is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation." Because the essence of the violation lies in the promise, the General Counsel must prove that Respondent has communicated such a promise, express or implied, either by its words or actions.

It is true that in ***Laboratory Corporation of America Holdings***, the Board also stated that the solicitation of grievances during a union organizing campaign *inherently* constitutes an implied promise to remedy them. That language seems to create an evidentiary presumption concerning how a particular question will be interpreted: During an organizing campaign, a "solicitation of grievances" will be presumed to carry the unlawful promise. However, this presumption does not change the requirement that an employer must pose the question to employees: "What are your gripes?"

If employees initiate the contact with management, as in *EFCO Corporation*, then the employer is not soliciting grievances; it is merely answering questions, which is totally lawful, so long as the answers do not convey a promise of benefits linked to union activities. Therefore, to prove an unlawful solicitation of grievances, the General Counsel must establish that a manager or supervisor said or did something to prompt employees to complain. Merely being willing to listen, having an "open door" policy, is not enough.

The present record does not establish a particular instance in which a manager encouraged an employee to offer grievances or complaints about working conditions. Due process requires such evidence. Even assuming a presumption that *any* solicitation of grievances during an organizing campaign carries an implied promise to remedy the grievance, a respondent still must have the opportunity to rebut such a presumption by pointing to the specific circumstances and arguing either that the conduct did not constitute a solicitation, or that management's response did not constitute a promise of benefits somehow linked to union activities.

In this case, the record establishes only that Respondent's merchandiser, Kelly Clifton, spent more time at the store during the organizing campaign than he normally did. However, the record also shows that while at the store, Clifton did exactly what he had done before the organizing campaign. In accordance with Respondent's general "MBWA" philosophy, Clifton "managed by walking around."

During such management by walking around, Clifton necessarily spoke with employees about many matters, including working conditions. The whole point of "MBWA" is to pluck the manager out of his ivory tower office, where he must rely on hearsay, often double or triple hearsay, and place him in the middle of the action, where he will receive more accurate information first–hand.

Respondent's management philosophy also espouses a somewhat similar concept of "servant leadership," in which supervisors work along with employees, learning about problems and frustrations by experiencing them. Respondent had implemented its "MBWA" and "servant leadership" principles long before the Union organizing campaign. From Clifton's testimony, which I credit, I find that Respondent had been using these techniques for at least a decade.

In view of this previous practice, I conclude that Respondent did not unlawfully solicit grievances during the union organizing campaign. Therefore, I recommend that the Board dismiss the allegations raised in Complaint paragraphs 7(d) and 7(m).

Complaint paragraph 8(b) alleges that Respondent granted certain benefits to employees. The evidence establishes that Respondent did put a refrigerator in the employee breakroom sometime in February 2000. However, it is uncertain whether this action took place before or after the filing of the representation petition on February 15.

Store manager Stacy credibly testified that a few days before Respondent brought in the refrigerator, employees had requested one. However, he added, having a refrigerator in a break room was nothing unusual and "In any store I've been at we've always had it."

The record does not indicate that Respondent made any statement to employees linking the refrigerator in any way to the union organizing campaign. Additionally, no evidence establishes that Respondent decided to install the refrigerator because of the Union organizing campaign. For these reasons, I conclude that installation of the refrigerator did not violate Section 8(a)(1) of the Act.

The Complaint also alleges that this action violated Section 8(a)(3) of the Act. Following the ***Wright Line*** analysis discussed above, I find that the General Counsel has not established any of the requisite four elements. In particular, it is difficult to understand how putting a refrigerator in a breakroom could constitute an "adverse employment action." Therefore, I recommend that this 8(a)(3) allegation be dismissed.

For the same reasons, I conclude that placing a microwave oven and speakers in the breakroom did not violate either Section 8(a)(1) or (3) of the Act. In this regard, it may be noted that Respondent placed the speakers in the breakroom so that employees could hear announcements broadcast over the public address system. Doing so may serve Respondent's interest in making the workplace more efficient, but is not the sort of benefit which reasonably would make employees want to vote against union representation.

Complaint paragraph 8(b) also alleges that Respondent added a coat cabinet, purchased new knives and a knife sharpener, and repaired the meat market drain. The record does not establish that Respondent made any statements which linked such changes to the union

organizing drive. All of these changes constituted improvements making Respondent's production process more efficient, and any benefits employees derived were incidental.

The National Labor Relations Act does not require an employer to leave a drain clogged so that employees would have to wade through waste water, become disgruntled, and therefore vote for the union. Indeed, it would be quite extraordinary to conclude that the Act required a business to violate sanitation codes. Similarly, the Act does not keep an employer from equipping its workers with appropriate tools or giving them a place, away from the working area, where they can hang their coats.

Of course, a hypothetical situation can be imagined in which an employer not only made such changes but also made unlawful statements about them. However, in this case, Respondent made no such statements. Moreover, the changes, such as fixing a drain or buying sharper knives, communicate no antiunion message.

These changes do not interfere with, restrain or coerce employees in the exercise of Section 7 rights. Therefore, I recommend that Board dismiss the Section 8(a)(1) allegations predicated on these changes, specifically, the allegations raised in Complaint paragraphs 7(d) and 7(m).

Additionally, the changes do not constitute an adverse employment action within the meaning of ***Wright Line***. There is no basis to conclude that they constitute discrimination against any employee to discourage membership in a labor organization. Concluding that these changes do not violate Section 8(a)(3), I recommend that the Board dismiss all allegations raised by Complaint paragraph 8(b).

Complaint Paragraphs 7(e), 7(f), 7(g), 7(h), 7(i), 7(j) and 7(k)

As stated above, after the hearing, the General Counsel withdrew the allegations raised by Complaint paragraphs 7(e) through 7(k).

Complaint Paragraph 7(l)

Complaint paragraph 7(l) alleges that Respondent, at the Palestine, Texas facility, about February 15 through April 12, 2000, restrained employees' union activities by placing high level management officials in the market. Complaint paragraph 19 alleges that this conduct violated Section 8(a)(1) of the Act. Respondent denies this allegation.

It may be noted that this allegation is significant for what it does not say. In a typical case, the General Counsel will allege that an employer interfered with the exercise of Section 7 rights by engaging in surveillance of employees' union activities or by creating the impression of such surveillance. However, Complaint paragraph 7(l) does not allege that Respondent's managers either engaged in surveillance of union activities or created the impression of such surveillance. It simply alleges that management officials were present in the market.

In some cases, the government alleges that supervisors engaged in specific harassing behavior, such as following employees to the restroom. See, e.g., ***Fieldcrest Cannon, Inc.***, 318

NLRB 470 (1995). In the present case, however, the General Counsel does not allege, and the record does not establish, that managers followed employees around during their nonworking time. Indeed, Complaint paragraph 7(l) does not assert that the supervisors were offensive in any way; it doesn't even allege that they had body odor. By the literal terms of Complaint paragraph 7(l), the mere presence of the supervisors sufficed to violate the Act.

Under some circumstances, proving the mere presence of an individual at a particular location *where he is not supposed to be* can help establish a violation of the Act. For example, evidence showing the presence of a picket at a gate reserved for neutrals is quite relevant to establishing a violation of Section 8(b)(4). Likewise, in considering surveillance in violation of Section 8(a)(1), no one would doubt the relevance of evidence showing that a supervisor with binoculars lingered near the union hall. Such instances, however, entail a person showing up somewhere he really shouldn't be or where, at the very least, his presence affords a legitimate cause for suspicion.

The present Complaint does not allege that Respondent instructed its managers to go to any improper or suspicious location. It simply alleges that Respondent placed them in one of its own facilities.

Obviously, the Act does not prohibit supervisors from being on their employer's premises. It also doesn't purport to define how many supervisors at a particular location are too many. Less obviously, but most significantly, the Act does not presume that a manager is present at a facility for an unlawful purpose. Even if a corporation's chief executive officer appeared every day at a particular facility, his presence does not constitute unlawful or objectionable behavior, and we may not infer simply from his presence that he has committed, or intends to commit, any unlawful act.

The record establishes only that during the critical period between the filing of the petition and the election, certain management personnel, notably the merchandiser and some labor relations personnel, appeared more frequently at the store. The labor relations staff members conducted meetings with supervisors, and other meetings with employees, explaining the Act and Board procedures. They also made themselves available to answer questions. The evidence does not establish, however, that they did anything unlawful, such as soliciting grievances.

In sum, Complaint language stating that an employer "restrained employees' union activities by placing high level management officials in the market" does not allege a violation of the Act. Moreover, the record does not establish that any of the management officials who appeared at the store violated the Act. Therefore, I recommend that the allegations in Complaint paragraph 7(l) be dismissed.

Complaint Paragraph 8(c)

As amended at hearing, Complaint paragraph 8(c) alleges that in about January 2000, the exact date being unknown, Respondent gave employee Mary Rogers a wage increase. Complaint paragraphs 19 and 20 allege that this action violated Sections 8(a)(1) and (3), respectively. Respondent has denied the alleged violations.

Store manager Stacy credibly testified that in about December 1999, employee Rogers had complained to him that she wasn't receiving the correct amount of pay. Stacy checked the records and concluded that Rogers was correct. However, to be sure, he asked Vicky Dodson, of Respondent's personnel department, to come to the store and examine the records. When Dodson arrived at the store and examined records, she confirmed that Rogers' pay was incorrect and recommended an adjustment, which Stacy implemented.

Before the General Counsel amended the Complaint orally at hearing, it alleged that Rogers received this pay increase in March 2000, which would have placed it within the critical period between the filing of the petition and the election. However, payroll records place the wage increase around January 15, 2000, a month before the Union filed the petition.

This early date is consistent with Stacy's testimony that he did not know about the Union organizing campaign when he asked the personnel specialist to check on Rogers' pay rate. Based on my observations of the witnesses, I believe that Stacy's testimony is reliable, and credit it.

Even though the Complaint alleges that Rogers was the subject of unlawful discrimination, the General Counsel did not call her to the witness stand. The government's failure to present this witness certainly does not help its case.

Almost invariably in an unfair labor practice proceeding, the General Counsel will call to the witness stand the persons named in the Complaint as being the subjects of discrimination. Such persons have singular knowledge of their own protected activities. Often, their testimony also establishes other necessary elements of the government's case. In the present case, however, the General Counsel did not call Rogers, and I will not simply assume that her testimony would have been favorable to the government's case.

In deciding whether the pay increase violated Section 8(a)(3), as alleged, I first consider whether to analyze the facts under the ***Wright Line*** framework. The Board applies *Wright Line* in cases which turn on the employer's motive. See ***Phoenix Transit Systems***, above. Here, a violation does turn on Respondent's motive.

Such motive–related cases may be divided into two categories: The employer's stated motive may be a pretext, rather than the real one, or an employer may take an employment action for a mixture of lawful and unlawful reasons. Raising Rogers' wage rate would seem to fall into the "pretext" category. Either Respondent acted simply to correct a mistake, as it claims, or else it increased her pay for some other, perhaps unlawful reason.

No evidence establishes that a desire to discourage union membership motivated the Respondent's action in any way. Certainly, the timing of the wage increase, a month before the Union filed its petition, does not raise suspicion. Nothing in the record suggests that any manager made any statement linking the pay raise to concerns about unionization. In sum, the evidence does not establish a violation.

Moreover, examining the facts within a ***Wright Line*** framework, it is clear that the General Counsel has not established that Rogers engaged in protected activities. Similarly, the government has not proven that management had any awareness, or even beliefs about, Rogers' union sympathies. The evidence also fails to establish the fourth *Wright Line* element, a connection between protected activities and the employment action in question.

In looking at the facts from a ***Wright Line*** perspective, I have assumed that a wage *increase* might be considered an "adverse" employment action because of the literal wording of Section 8(a)(3) of the Act. That provision does not prohibit discrimination against an employee but, more exactly, "discrimination in regard to hire or tenure of employment or any term or condition of employment." 29 U.S.C. Section 158(a)(3). "Discrimination" simply connotes a difference in treatment, so it could include a wage increase as well as a wage reduction.

Nonetheless, it is clear that under a ***Wright Line*** framework, the evidence fails to establish three of the four essential elements. The facts fall short of establishing a violation either under *Wright Line* or otherwise. Therefore, I recommend that the Board dismiss the allegations raised by Complaint paragraph 8(c).

The Union's Objections in Case 16–RC–10181

After the April 12, 2000 election at the Palestine facility, Local 455 filed timely objections, which are in evidence as General Counsel's Exhibit 1(u). Many of the 16 objections appear to be coextensive with the unfair labor practice allegations discussed above. Unfortunately, the Union's post–hearing brief did not focus on individual objections, cite evidence supporting the various objections, or describe how any particular objection depended on facts different from the alleged unfair labor practices.

Such briefing would have been exceptionally helpful in this case because after the hearing closed, the General Counsel withdrew a substantial number of the Section 8(a)(1) allegations, presumably for want of proof. Regardless of the fate of any particular unfair labor practice allegation, I will consider each objection carefully in light of the entire record.

1. **Objection 1** states as follows:

> During the critical period [February 15, 2000 to April 12, 2000], the Employer, objectionably and unlawfully, "packed" the unit by transferring employees from non–unit positions into the unit positions, which employees the Employer believed and expected would vote against the Petitioner.

At least in part, this objection depends on the same evidence as the unfair labor practice allegations raised in Complaint paragraphs 7(a) and 8(a). As discussed above, the evidence establishes that Respondent transferred three employees into the meat department effective February 5, 2000. That action took place 10 days before the critical period began. Moreover, the record fails to establish that Respondent made these transfers for any reason other than filling vacancies and assuring that the meat department had sufficient staff.

Because these transfers took place before the critical period began, and because the evidence establishes that Respondent made the transfers for legitimate business reasons unrelated to the Union organizing campaign, they do constitute objectionable conduct.

Additionally, the record does not establish that Respondent made other transfers into the meat department for reasons related to the Union's organizing campaign. Therefore, I recommend that Objection 1 be overruled.

2. **Objection 2** states as follows:

> During the critical period, the employer granted pay increases and other improvements in terms and conditions of employment and/or other inducements to the employees referred to in Objection 1 to induce and further induce them to oppose and vote against the Union.

As discussed above, the record establishes that Respondent increased the pay of certain employees, including Mary Rogers. However, credible evidence does not demonstrate that Respondent took these actions in response to the Union's organizing campaign rather than to correct mistakes. Additionally, documentary evidence establishes that Respondent adjusted Rogers' pay in January 2000, before the critical period began.

In other respects, the record does not establish the facts alleged in this objection. Therefore, I recommend that Objection 2 be overruled.

3. **Objection 3** states as follows:

> During the critical period, the Employer reassigned and/or transferred unit employees to non–unit positions and jobs in an objectionable and unlawful effort to render such employee[s] ineligible to vote in the election because the Employer perceived such employees to be Union supporters who would vote in favor of the Petitioner.

Credible evidence does not support this objection. Therefore, I recommend that Objection 3 be overruled.

4. **Objection 4** states as follows:

> During the critical period, the Employer took the action detailed in Objection 3 above against one of the referred to employees to unlawfully discriminate and retaliate against and impose more onerous working conditions on said employee because of the employee's Union and other protected, concerted activities.

The meaning of this objection is not entirely clear. As I interpret it, the Union alleges that Respondent transferred an employee out of the meat department not merely to decrease the number of pro–Union votes, but also to punish the employee for supporting the Union. If my understanding is correct, then the Union is asserting, in essence, that the transfer violated Section 8(a)(3), causing a chilling effect.

In other words, the Union appears to be asserting in Objection 3 that transfers out of the unit interfered with a fair election by diluting its strength and further contending, in Objection 4,

that one of the transfers made the remaining employees reluctant to vote for the Union because of the fear of retaliation.

The Complaint does not allege that Respondent unlawfully discriminated by transferring an employee out of the meat department. More fundamentally, the record does not establish such a fact. Therefore, I recommend that the Board overrule Objection 4.

5. **Objection 5** states as follows:

> During the critical period, the Employer solicited grievances and/or complaints from employees concerning their wages, hours, working conditions and other terms and conditions of employment and implicitly and/or explicitly promised to remedy such grievances and/or complaints and thereby objectionably and unlawfully sought to dissuade them from supporting the Union.

After the hearing closed, the General Counsel withdrew Complaint paragraph 7(f), which had alleged that Respondent had engaged in an unlawful solicitation of grievances. Additionally, I have found that the government has failed to establish the solicitation of grievances alleged in Complaint paragraph 7(d).

More generally, no credible evidence establishes that Respondent solicited grievances or promised to remedy such complaints. Therefore, I recommend that the Board overrule Objection 5.

6. **Objection 6** states as follows:

> During the critical period, the Employer promised and/or granted unit employees promotions, raises, management/supervisory positions, management training opportunities, transfers to higher paying jobs and/or positions and other inducements in an objectionable and unlawful effort to dissuade such employees from supporting or voting for the Union.

No evidence supports this objection. Therefore, I recommend that the Board overrule it.

7. **Objection 7** states as follows:

> During the critical period, the Employer made improvements in employees' working conditions and the tools and equipment that they used to dissuade employees from supporting the Union.

This objection concerns the same conduct described in Complaint paragraph 8(b), and the record discloses no other instances of similar actions. For the reasons discussed above, I have found that these actions did not violate Section 8(a)(1) or (3) of the Act. However, that conclusion does not end the inquiry because some conduct may be objectionable, and warrant setting aside the election, even though it does not constitute an unfair labor practice.

In *Noah's Bay Area Bagels, LLC.*, 331 NLRB 188 (2000), the Board noted that the mere grant of benefits during the critical period does not, per se, constitute grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect.

In the present case, Respondent made no statements to employees which would associate the changes in working conditions with either the upcoming representation election or the Union's organizing effort. No other evidence establishes that Respondent made these changes to influence how employees voted. To the contrary, I conclude that Respondent made the changes to improve production.

Additionally, the changes were not of a type which reasonably would be calculated to have such an effect. For example, providing better knives and a sharpener to meatcutters benefitted the Respondent as much, if not more than it did the employees. The better equipment did not increase the employees' compensation, but it would produce a foreseeable improvement in their production.

Similarly, when Respondent installed speakers in the employee breakroom, this action benefitted Respondent by allowing the workers to hear announcements on the public address system. Providing employees a place to hang their coats also served Respondent's need to reduce clutter in the workplace. When Respondent repaired a faulty drain, that action obviously constituted an improvement in working conditions, but Respondent would have had to take the same action even in the absence of a Union organizing drive simply to maintain adequate sanitation.

The only changes which appeared to benefit employees more than Respondent involved putting a refrigerator and microwave oven in the breakroom. However, the record does not establish that Respondent installed these appliances to influence employee sentiments about the Union, rather than merely to bring this particular breakroom up to the standards of breakrooms in Respondent's other facilities.

In sum, applying the standards expressed in *Noah's Bay Area Bagels*, I conclude that to the extent Respondent's actions constitute a "grant of benefits," they were not objectionable. Therefore, I recommend that the Board overrule Objection 7.

8. **Objection 8** states as follows:

> During the critical period, the Employer objectionably and unlawfully told employees that they would/could lose the monies in their 401(k) and Profit Sharing Plans if the Union was selected as their collective–bargaining representative.

The record does not support this objection and I recommend that it be overruled.

9. **Objection 9** states as follows:

> During the critical period, the employer conducted an objectionable meeting with unit employees within 24 hours of the scheduled election.

The record does not support this objection and I recommend that it be overruled.

10. **Objection 10** states as follows:

> During the critical period, the employer objectionably and unlawfully informed unit employees that employees lawfully eligible to vote in the election would not be permitted to do so.

The record does not support this objection and I recommend that it be overruled.

11. **Objection 11** states as follows:

> During the critical period, the Employer created the impression among unit employee that Unionism would be futile and expressly and/or implicitly told employees that the Employer would not bargain in good faith with the Union if it was selected as the unit employees' collective bargaining representative.

It appears that this objection parallels the allegations in Complaint paragraphs 7(i) and 7(j), which the General Counsel withdrew. No evidence supports this objection and I recommend that the Board overrule it.

12. **Objection 12** states as follows:

> During the critical period, the Employer told employees that Unionization would be futile and expressly and/or implicitly informed employees that the Employer would engage in unlawful bad–faith bargaining.

This objection appears to be simply a paraphrase of Objection 11. In any event, the record does not support this objection and I recommend that it be overruled.

13. **Objection 13** states as follows:

> During the critical period, the Employer told employees that, even though the employees might be able to win an election, Wal–Mart would never bargain with the Union and Wal–Mart would never sign a contract with the Union.

This objection also appears to be a paraphrase of Objections 11 and 12. Evidence does not support the objection and I recommend that the Board overrule it.

14. **Objection 14** states as follows:

> During the critical period, the Employer, acting through managers, supervisors and corporate headquarters personnel, eased the regular work burden on unit employees by,

> among other things, performing portions of the employees' job duties and work tasks in order to objectionably and unlawfully dissuade unit employees from supporting the Union.

The record establishes that well before the Union organizing campaign, Respondent had promulgated policies of "managing by walking around" and "servant leadership" which encouraged managers to work alongside employees. Management personnel did work in the Palestine facility during the critical period, but no evidence suggests that any manager or supervisor ever told an employee that he was reducing the employee's work burden because of the Union organizing campaign or to influence the employee's vote.

In these circumstances, the managers' actions did not constitute conduct warranting setting the election aside. Therefore, I recommend that the Board overrule Objection 14.

15. Objection 15 states as follows:

> During the critical period, the Employer engaged in the objectionable and unlawful conduct detailed in the Charge in Case 16–CA–20321.

On March 13, 2000, the Union filed an unfair labor practice charge against Respondent in Case 16–CA–20321. The Union alleged, in part, that Respondent unlawfully devised and announced the implementation of a plan to stock the meat department with case–ready meat, thereby changing the job duties of certain employees. The Union also asked the Board to seek an injunction in federal court to stop Respondent from making this change.

On February 28, 2001, the Regional Director for Region 16 dismissed portions of this charge pertaining to the Respondent's Jacksonville, Texas store. The dismissal letter concluded, in part, as follows:

> The evidence demonstrated that the Employer decided prior to the start of the Union activity [at Jacksonville] to expand the case–ready beef program, thus sustaining the Company's *Wright Line* defense. Additionally, the evidence was found to be insufficient to show that the Employer accelerated its transformation to case–ready beef in retaliation for the Union activity of its employees.

The Union appealed this partial dismissal, but the Office of Appeals denied the appeal. Additionally, the Board did not seek the injunctive relief which the Union had requested.

Case 16–CA–20321 is not part of the present consolidated proceeding. The Complaint in the present case does not allege that Respondent violated the Act by announcing and implementing a change to case–ready meat. It does allege, as discussed more fully below, that Respondent unlawfully refused to bargain about the *effects* of this change on the meat department employees at Jacksonville.

The General Counsel has broad prosecutorial discretion deciding whether to prosecute or dismiss allegations raised by a charge. Similarly, the General Counsel possesses the authority to define and limit the theory under which an unfair labor practice case is prosecuted. The General Counsel has chosen not to allege that Respondent committed unfair labor practices by changing

to case–ready meat, and that issue is not before me. For the same reason, in the unfair labor practice context, I need not consider the Union's claim that Respondent unlawfully accelerated the change to case–ready meat.

The General Counsel's prosecutorial discretion pertains to the enforcement of Section 8 of the Act, which defines and prohibits various unfair labor practices. This prosecutorial discretion does not extend to issues arising under Section 9 of the Act, which applies to representation proceedings. The General Counsel's decision that certain conduct does not warrant issuance of a complaint does not resolve the question of whether that same conduct affects the fairness of an election. The Board has long held that actions which do not violate Section 8 may still upset the laboratory conditions necessary for a fair election under Section 9 of the Act. ***General Shoe Corp.***, 77 NLRB 124 (1948).

Regardless of the General Counsel's decision to dismiss portions of the charge in Case 16–CA–20231, I must examine whether Respondent's change to case–ready meat, and its timing of that decision, affected the laboratory conditions surrounding the April 12, 2000 election at the Palestine facility. Respondent had announced its intention to switch to case–ready meat on February 28, 2000, so there is no doubt voters knew about this anticipated change on election day.

The evidence does not establish that Respondent held this contemplated change as a threat "over the heads" of the employees to influence their voting. To the contrary, Respondent pointedly assured employees that no one would lose his job or suffer a pay cut. Moreover, Respondent consistently described this decision as final and based upon business considerations, and not as something tentative which might be affected by the outcome of the election.

In these circumstances, the announced change to case–ready meat did not affect the laboratory conditions necessary to assure a fair election. Therefore, I recommend that the Board overrule Objection 15.

16. Objection 16 states as follows:

> During the critical period, the employer engaged in other acts that restrained, coerced and interfered with employees in the exercise of their Section 7 rights and/or other acts of discrimination against employees because of their Union and other protected, concerted activities and/or other acts of discrimination in favor or [sic] employees because of their Employer perceived anti–Union sentiments and/or other acts of objectionable conduct and/or conduct that affected the outcome and results of the election.

This objection does not point to particular instances of alleged improper conduct. The present record does not establish such conduct. Therefore, I recommend that the Board overrule Objection 16.

Summary

The record fails to support the Union's objections in Case 16–RC–10181. Therefore, I recommend that the Board overrule these objections and certify the results of the April 12, 2000 election.

Respondent contends that the change to case–ready meat rendered the voting unit an inappropriate one for collective–bargaining. This argument will be discussed further, below, in connection with the allegations involving Respondent's Jacksonville, Texas, facility. However, in view of my recommendation that the Board overrule the Union's objections and certify the results of the election, I do not believe it is necessary to examine whether the Palestine voting unit continues to be an appropriate one for collective bargaining.

2. Respondent's Jacksonville, Texas Facility

Background

Section 9(b) of the Act directs the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . ." In making such determinations, the Board looks to whether a "community of interest" unites the employees in a particular proposed bargaining unit. If all employees in a bargaining unit share such a community of interest, the unit will function like a canoe in which all occupants are paddling in the same direction. However, if the unit consists of employee groups with conflicting interests, the canoe more likely will go in circles rather than towards a common goal.

Historically, the interests of highly skilled members of a craft may differ from those of other employees whose jobs do not require the same training and experience. For one thing, the two employee groups may well disagree concerning how much the employer should reward the craft members for their special skills. Less tangibly, the rigors of acquiring a body of specialized knowledge establish a bond between craft members which distinguishes their relationships with each other from their relationships with employees outside the craft.

The Board has long recognized that the special cohesiveness fostered by membership in a craft can create a community of interest distinct from that of other employees. In the retail industry, for example, the Board considers storewide units presumptively appropriate but historically, it also has presumed that a unit of meatcutters will be appropriate because of the special skills shared by members of their craft.

In recent decades, however, profound changes have affected the work of meatcutters. Not so long ago, grocery customers typically could look over the refrigerated meat cases and through the cutting room window to see beef carcasses hanging on hooks near the butcher block. That sight has disappeared from many, if not most, supermarkets. The change came in stages.

First, the work of dividing an entire carcass into large segments ("primals") moved from the supermarket to the packing house. At the store level, meatcutters began receiving the partially cut meat and commonly called it "boxed" meat, a term which can be confusing. Although boxed for shipment to the meatcutters, such meat is not yet ready for display and sale to the public. At the store, the meatcutters still must cut the boxed meat into the smaller pieces desired by customers. This work, although not as extensive as cutting up an entire carcass, requires specialized knowledge.

More recently, some supermarkets have begun receiving meat in small plastic–wrapped packages ready for display and sale to the public. This "case–ready" meat does not require further cutting or even labeling. Employees handling this product draw on skills little different from those of sales associates who place cans of soup or boxes of cereal on the appropriate shelves.

In ***Scolari's Warehouse Markets***, 319 NLRB 153 (1995), the Board decided how the amount of meatcutting skill would affect the appropriateness of a meat department bargaining unit. A "traditional" meat department depended on members of a craft using the full panoply of meatcutting skills. Such a meat department could not function without the craftsmen, and a unit organized along craft lines was appropriate. Significantly, not all employees in the unit would possess the skills of a journeyman craftsman, but the work of the department centered on these traditional skills. The skilled meatcutters anchored the unit and made it distinct from other parts of the grocery store.

In other stores, where meatcutters only used the limited skills needed to finish the processing of "boxed" meat, these limited skills did not warrant a unit centered on a traditional craft. However, the Board held in ***Scolari's*** that the limited meatcutting skills still distinguished these employees from those in other parts of the store. So it was appropriate to consider whether a separate unit of meat department employees would be appropriate under the "community of interest" standards the Board applies in non–craft situations.

Thus, the Board might find a separate meat department unit appropriate if the evidence showed that meat department employees differed from other store workers in a number of significant ways, for example, if they had separate supervisors, earned different wage rates, and seldom transferred to other parts of the store. Applying this analysis to the facts in ***Scolari's***, the Board found a separate unit of meat department employees appropriate:

> In sum, we find that the following factors: (a) the substantial portion of the Employer's meat department business involving boxed meat; (b) the continued application of specialized meatcutting skills necessary for the processing of the boxed meat; (c) the higher level of training of meatcutters; (d) the substantial percentage of the unit engaged in skilled meatcutting work; (e) separate supervision; (f) limited interchange and transfers; and (g) higher wages, *outweigh the factors* of common benefits and limited skills necessary for handling the Employer's case–ready meats, and support a finding that the meat department employees have a distinct community of interest apart from that of the Employer's other employees.

319 NLRB at 158 (emphasis added).

As the *Scolari's* decision illustrates, the Board weighs the competing factors to determine the appropriateness of the separate meat department unit. In a meat department which exclusively uses case–ready meat, employees do not need any meatcutting skills. Therefore, this factor no longer can weigh in favor of a separate meat department unit. Will removal of this skill factor tip the balance against finding the separate unit appropriate?

This question cannot easily be answered in the abstract because it depends on the weights assigned to the other factors, which in turn depend on the particular facts. A hypothetical situation certainly can be imagined in which no meat department employees cut any meat at all, worked under entirely separate supervision from other emplyees, earned considerably different wages, never transferred to a different department, were required to complete a training course about the standards of the National Livestock and Meat Board, and had to be able to answer customer questions about arcane meat matters such as how to cook a goat. The appropriateness of this hypothetical meat department would not turn on the absence of meatcutting. In the real world, however, cost considerations might make such a meat department highly improbable. The point is simply that generalities do not suffice; each case must be decided on its specific facts.

Still, it may be observed that the limited skills exercised by meatcutters when processing boxed meat constitute an important factor entitled to considerable weight. In *Ray's Sentry*, 319 NLRB 724 (1995), the Board reversed a regional director's determination that a separate unit of bakery and delicatessen employees was appropriate. The regional director had relied on cases finding separate meat department units appropriate but the Board found its *Scolari's* decision distinguishable:

> [T]he meat department employees [in *Scolari's*] had a sufficiently distinct community of interest from other employees at the supermarkets involved that a separate meat department unit was warranted. However, there, in addition to other factors demonstrating their distinct community of interest, the meatcutters in *Scolari's* continued to exercise many of the traditional craft skills and had extensive meatcutter training or were apprentice meatcutters. As indicated above, it has not been demonstrated that the bakery/deli employees here possess or exercise such skills or require such training.
>
> Accordingly, we find that the bakery/deli unit is inappropriate.

319 NLRB at 724.

In the present case, Respondent asserts that its conversion from "boxed" meat to case–ready meat rendered inappropriate a previously–certified unit of meat department employees at its Jacksonville, Texas store. Further, it contends that when the unit became inappropriate, Respondent no longer had an obligation to bargain with the Union concerning employees in that unit.

The Jacksonville Unit

On December 28, 1999, Local 540 filed a petition to represent a unit of meat department employees at Respondent's Jacksonville store. In keeping with its standard procedures in representation cases, the Board's regional office conducted a hearing concerning the meat

department employees. Although Respondent took part in this hearing, it did not announce that it planned to end all its meatcutting and change exclusively to case–ready meat. Similarly, Respondent did not present any evidence to this effect.

After the hearing, the Acting Regional Director issued a January 26, 2000 Decision and Direction of Election finding that the meat department employees shared a community of interest separate from that of other store employees. Concluding that the meat department employees constituted an appropriate unit for collective–bargaining, the Acting Regional Director wrote:

> Critical to my determination are factors addressing the level and depth of meatcutting skills exercised by the Employer's meat processors and how these employees handle the boxed red meat that arrives in the meat department for eventual sale to customers. The record reflects that 30% of the Employer's meat sales are derived from boxed red meat. This figure is comparable to those percentages of boxed meat sales found to be a substantial portion of an employer's meat business in ***Scolari's Warehouse Markets, Inc.***, 319 NLRB at 157 and *Super K–Mart Center*, 323 NLRB at 587. More importantly, record evidence shows that meat processors spend approximately 75% of their time at work cutting boxed meat and preparing it for sale to customers. This figure does not include the additional 10% of time spent by meat processors to unload the meat from the trucks. Hence, these percentages reflect that meat processors spend a significant part of their time handling and cutting boxed meat, particularly when compared to the time meat processors spend meatcutting at other stores of the Employer. *See, e.g.,* ***Wal–Mart Stores, Inc.***, 328 NLRB No. 126, slip op. at 2.

A number of other factors weighed against finding that meat department employees shared a community of interest distinct from others in the store. For example, meat, deli, dairy and grocery department employees worked together to unload refrigerated and frozen food products. Sometimes, meat department employees served deli department customers and deli employees sometimes stocked meat cases. Moreover, sometimes deli and meat department employees shared common supervision.

Thus, the evidence in the representation hearing suggested that a unit broader than meat department employees might be appropriate. However, as the Acting Regional Director observed, a union is not required to petition for the *most* appropriate unit, only for *an* appropriate one. The Acting Regional Director noted that in challenging the appropriateness of a petitioned–for unit, an employer had to do more than show that some other unit might be more appropriate; the employer had to demonstrate that the petitioned–for unit itself was inappropriate. The Acting Regional Director concluded that Respondent had not carried this burden:

> Although the evidence reflects there is general interaction among employees at the Employer's store and that employees share common benefits and bonuses and, to a certain limited extent, common supervision, these considerations do not outweigh the other factors such as the substantial time meat department employees spend in handling and cutting meat or the unique and special skills they exercise when performing these job duties.

The Acting Regional Director therefore found that the following, petitioned–for unit, was appropriate:

> INCLUDED: All full–time and regular part–time employees employed in the meat market at the Employer's retail store located at 1311 S. Jackson Street, Jacksonville, Texas.
>
> EXCLUDED: All other employees, including store managers, assistant managers, overnight managers, department managers, personnel managers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Respondent asked that the Board review and reverse the Acting Regional Director's Decision. However, its February 9, 2000 Request for Review did not mention any plan to eliminate meat cutting and go entirely to case–ready meat. Instead, Respondent argued that the Acting Regional Director had given unwarranted weight to the fact that employees did some meatcutting. Respondent contended that the percentage of meatcutting performed at the Jacksonville store was far less than the amount performed by the employees in *Scolari's* and similar cases. The Board denied Respondent's request for review.

Under Section 102.67 of the Board's rules, a request for review does not automatically postpone a scheduled election. On February 17, 2000, the Board conducted the election. The Union received a majority of the valid votes cast.

On February 23, 2000, Respondent filed objections to conduct affecting the results of the election. These objections did not mention Respondent's plan to phase out boxed meat and go exclusively to case–ready meat. However, on February 28, 2000, in connection with the representation hearing involving the Palestine store, Respondent did announce this plan. In early March 2000, Respondent advised its employees about the plan.

On March 13, 2000, by hand–delivered letter, Local 540 requested that Respondent bargain with it concerning the Jacksonville meat department employees. This letter alluded to the Respondent's plan to eliminate meatcutting and use only case–ready meat:

> Wal–Mart has publicly announced its intent to change the way meatcutters do their jobs. You failed to notify to arrange for negotiations with the elected representative of employees concerning any changes in the Meat Market.
>
> UFCW Local 540 demands that you immediately arrange for good faith negotiations with Meat Market employees through their authorized representatives.

The Union placed its demand for negotiations in a separate paragraph from its reference to the changes in the meat department, and it did not limit the this demand to any specific subject. Therefore, it is possible that the March 13 letter constitutes a general demand that Respondent negotiate concerning all mandatory subjects of bargaining. However, from a letter which the Union's lawyer sent to Respondent's counsel several days later, it appears that the Union's bargaining demand focused narrowly on Respondent's announced case–ready meat program with its consequent elimination of meat cutting.

In any event, I conclude that the Union's March 13, 2000 letter constituted a demand to bargain over both Respondent's decision to implement an exclusively case–ready meat program

and the effects of that decision. The Union's letter did not refer, simply and abstractly, to Respondent's decision to use only case–ready meat; instead, it expressed concern about Respondent's announced intent to change "the way meatcutters do their jobs." This focus on the effects of the announced change makes clear that the Union sought to bargain over the effects of Respondent's decision as well as the decision itself.

On March 14, 2000, Respondent's attorney replied to the Union's May 13, 2000 letter by facsimile. This letter stated that because of "valid legal objections and challenges to the unit," Respondent continued "to doubt in good faith that your organization represents a majority of any appropriate unit of Wal–Mart associates. Your request for immediate recognition as the collective bargaining representative of the Meat associates in the Wal–Mart store in Jacksonville is therefore denied. . ."

Respondent's March 14, 2000 letter did not mention any plan to phase out meatcutting and go exclusively to case–ready meat. It did not address at all the Union's statement that "Wal–Mart has publicly announced its intent to change the way meatcutters do their jobs."

On March 28 and 29, 2000, a hearing officer took evidence concerning the Respondent's objections to conduct affecting the February 17, 2000 election. Although Respondent took part in this hearing, it did not assert that the contemplated change to case–ready meat had made the unit inappropriate.

On April 21, 2000, the hearing officer issued a report recommending that the Board overrule the Respondent's objections and issue a certification of representative. Respondent filed exceptions to the hearing officer's recommendations. These exceptions did not mention Respondent's plan to eliminate meatcutting and go exclusively to case–ready meat.

By June 28, 2000 letter to Respondent's Jacksonville store manager, Local 540 demanded "bargaining over a collective bargaining agreement for the store's meat market employees."

On July 18, 2000, Local 540 sent Respondent two letters. One constituted a request for information and documents, and is described more fully below. The other renewed the Union's demand to bargain "over your store's change to case–ready meat."

The next day, Respondent's counsel responded to these two letters by facsimile. This letter denied the Union's requests for bargaining and for information. Significantly, this letter did mention the Respondent's change to case–ready meat: "Wal–Mart continues to believe strongly that the Board's Decision to proceed to an election in a meat department unit was not supported by the facts or the law in this case, *particularly in light of* ***Wal–Mart's*** *implementation of its case–ready meat program in the Jacksonville store.*" Joint Exhibit 9 (emphasis added).

Even though Respondent's July 19, 2000 letter refers to the case–ready meat program as a reason for invalidating the election, it did not present this argument to the Board. At least, it did not do so before the Board issued its August 9, 2000 Decision and Certification of Representative in Case 16–RC–10168. In that action, the Board rejected Respondent's objections, adopted the hearing officer's report, and certified Local 540 as the exclusive bargaining representative of the meat department employees.

The Board's issuance of this Decision and Certification of Representative closed Case 16–RC–10168. As will be discussed further below, the issues decided by the Board in that proceeding may not be relitigated now in the absence of newly–discovered evidence or unusual circumstances. ***Pittsburgh Plate Glass Co. v. NLRB***, 313 U.S. 146 (1941).

Notwithstanding the Board's certification, Respondent has continued to refuse to recognize and bargain with the Union and has continued to refuse to provide the requested information. On August 21, 2000, Local 540 filed a charge against Respondent in Case 16–CA–20603. It alleged that Respondent had violated Sections 8(a)(1) and (5) of the Act by refusing to bargain collectively and by failing and refusing to provide information the Union had requested.

Respondent does not deny that it continues to refuse to recognize and bargain with the Union. It also does not deny that it has not provided the information requested by the Union on July 18, 2000. Instead, Respondent claims that it has no duty to take these actions because its conversion to an exclusively case–ready meat program, and the consequent elimination of all meatcutting, make the certified unit inappropriate. Additionally, Respondent raises a number of other defenses, including the statute of limitations provision found in Section 10(b) of the Act.

Before considering Respondent's defenses, I will first examine whether Respondent's conduct would be violative in the absence of a valid defense. If there is no violation, obviously, no defense at all is necessary. However, if Respondent's conduct is violative, I must also determine when the violation began, a finding particularly relevant to Respondent's 10(b) defense.

Respondent could not have breached a duty to bargain with the Union unless it had such a duty. In general, an employer's duty to bargain with a union begins when two things happen: First, a union must obtain the support of a majority of employees in a unit appropriate for collective bargaining. Second, after obtaining such majority status, the union must make a demand to bargain; at that point, the employer has a duty to recognize the union and bargain with it.

Therefore, I begin by determining when the Union attained majority status, which is its "birthday" as the unit's exclusive bargaining representative. A baby's birthday is the day she first draws breath and announces her arrival with a cry, not some later date when the government issues a birth certificate. A similar principle applies here. Local 540 became the employees' representative on election day, February 17, 2000, when it received a majority of votes. The Board's later certification simply confirmed this fact.

On March 14, 2000, the Union demanded that Respondent bargain concerning implementation of the case–ready meat program. At that time, less than a month after the Union won the election, it clearly enjoyed majority status. Respondent therefore had a duty to bargain with the Union concerning mandatory subjects of collective–bargaining.

The Complaint in this case does not allege that Respondent violated the Act by refusing to bargain concerning its *decision* to phase out meatcutting and use only case–ready meat. The General Counsel might have based this exercise of prosecutorial discretion on (1) a conclusion

that Respondent made a final decision to implement the case–ready meat program before the Union attained majority status, or (2) a conclusion that implementation of this program was not a mandatory subject of collective–bargaining because of the Supreme Court's decision in ***First National Maintenance Corp. v. NLRB***, 452 U.S. 666 (1981), or (3) both. In any event, the Complaint does not allege that Respondent violated the Act by refusing to bargain over its case–ready meat decision, and in the absence of such an allegation, I do not consider this question.

However, the Complaint does allege that Respondent violated the Act by refusing to bargain over the effects of that decision. For the reasons discussed above, I have concluded that the Union's March 13, 2000 letter constituted a demand to bargain about both the case–ready meat decision and its effects. At the time it sent this letter to Respondent, Local 540 already enjoyed the support of a majority of employees in the collective–bargaining unit, and was, therefore, the exclusive bargaining representative.

Thus, on March 13, 2000, both conditions necessary to establish a bargaining duty had been satisfied. Local 540 enjoyed majority support and it had made the demand to negotiate. Respondent therefore had a duty to negotiate over mandatory subjects of collective–bargaining, which include the effects of its case–ready meat program on members of the bargaining unit. Absent a valid defense, Respondent's March 14, 2000 refusal to engage in such negotiations violated the Act.

Respondent's statute of limitations defense is unavailing. Section 10(b) of the Act provides, in part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . ." 29 U.S.C. § 160(b) The Union filed a general refusal–to–bargain charge, in Case 16–CA–20603, on August 21, 2000, which is less than 6 months after Respondent's March 14, 2000 refusal.

It is true that the Union's August 21, 2000 charge did not specifically refer to Respondent's March 14, 2000 letter, but it did not have to be that specific. The charge alleged that Respondent "refused to collectively bargain with Local 540 over the terms and conditions of employment of its Jacksonville supercenter meat department employees" and that language certainly is specific enough to toll the statute of limitations.

Respondent also asserts that it had no duty to bargain with Local 540 because its conversion to only case–ready meat rendered the bargaining unit inappropriate. Based on the credited testimony of store manager Ronald McCall, I find that the Jacksonville store received its first shipment of case–ready meat sometime between June 17 and June 20, 2000. According to McCall, it took about 30 days to sell all the remaining boxed meat, and after it was gone, the meat saws were cleaned and dismantled. Therefore, I conclude that Respondent's employees ceased cutting meat at the Jacksonville store in mid–July 2000. That date was 4 months after the Union's demand to negotiate.

Respondent contends, however, that the bargaining unit did not become inappropriate in July 2000, when the meatcutting ended, but much earlier, when management announced its case–ready meat plan. In its post–hearing brief, Respondent argued:

> . . .Wal–Mart formally announced at the February 28, 2000 unit determination hearing in Palestine its plans to convert its meat departments to case–ready meat by the first week of August 2000. . .Wal–Mart presented unrefuted evidence that all in–store cutting and handling of boxed meat would cease as a result of that program. The Union, the Region, and the public–at–large learned of Wal–Mart's plans at that hearing. Under Board law, the *Jacksonville* unit ceased to exist the day that announcement was made.

Respondent's argument, however, is not consistent with the facts. It is true that during the Palestine representation hearing, Respondent presented evidence concerning its plans to convert to case–ready meat. However, this evidence failed to establish when such a change would take place. Similarly, it failed to establish that Respondent had made a firm decision to implement the plan at its Palestine, Texas store, let alone at its Jacksonville store. The Acting Regional Director's decision directing an election at the Palestine store considered Respondent's evidence on this point and found it insufficient:

> At the hearing, the Employer provided a copy of a letter it sent to Iowa Beef Processors (IBP) on December 29, 1999, a copy of internal memos discussing case–ready beef, pork, lamb and veal discussions with potential suppliers, and a copy of documents that details the case–ready meat program implemented in Arkansas. The IBP letter discusses some details related to IBP's agreement to begin sending prepackaged beef to the Employer's distribution centers in Clarksville, Arkansas and Temple, Texas. This document does not reflect any specific dates as to when the case–ready beef will roll out of these distribution centers, nor is the document signed by IBP. Employer Vice President Peterson testified that the issues underlying the vendor agreement with IBP *still needed to be worked out* and that a vendor agreement had not been executed. The record reflects that arrangements to inform the associates at affected stores such as Palestine were not undertaken until just a few days before the hearing. A substantially similar petition was filed by the Union on December 28, 1999, involving a store operated by the Employer in Jacksonville, Texas. No evidence regarding the Employer's case–ready meat program was offered at the hearing that was held in that matter on January 12 and 13, 2000. One meat processor testified that he was not made aware of the Employer's intent to go to case–ready meat products until being so informed through hearing testimony. Peterson testified that no exact dates had been previously set or announced because of the need to work out precise and exact dates with IBP for the perishable products that would be involved with the changeover.
>
> The Board has consistently held that the mere speculation as to the uncertainty of future operations is not sufficient to dismiss a petition or decline to hold an election. . .Although the Employer maintains that it has a final agreement with IBP regarding case–ready beef, the evidence does not support this contention. Specifically, the December 29, 1999 letter to IBP raises questions as to whether the parties have any formal obligation to each other. First, although the Employer asserts that May 15, 2000 and June 19, 2000 are pinnacle dates for the implementation of its case–ready meat program, there are no specific dates detailed in the IBP letter indicating when the case–ready beef was going to be rolled out at Clarksville and Temple distribution centers. As the Employer represented at the

> hearing that specific and precise dates were essential because of the products being dealt with, it is improbable that it would rely on this letter to define all the terms of its proposed relationship with IBP.
>
> Second, the document proffered by the Employer as representative of a final agreement is not signed by IBP. This lack of signature is even more troubling considering [that] the Employer represents in the letter that it has unilateral authority to end its agreement with IBP at any time. Third, the Employer did not provide copies of any vendor agreements confirming either the May 15 or the June 19, 2000 roll out dates with IBP. The Employer acknowledged at the hearing that it did not yet have a vendor agreement with IBP and admitted there were details that still need to be worked out between the parties. Moreover, the Employer documented in its letter to IBP that although the parties had not reached agreement on the vendor agreement issue, the Employer was still maintaining that [a] vendor agreement needed to be in place between the parties. Such comments by the Employer reflect that there were still critical details to work out between the parties. . .
>
> The Employer also points to its pilot program as being indicative of its intentions to permanently implement its case–ready beef program. Although this program reflects the Employer's interest in case–ready meat products, the record evidence reflects that the pilot program is ongoing and subject to continual change.
>
> Based on the foregoing, record evidence does not establish that there is sufficient certainty that the Employer will implement its case–ready program in the Palestine, Texas store. There remain significant unresolved matters associated with the Employer's announced elimination of all meat processing at its stores to enable me to conclude that its decision to use only prepackaged meat products will be implemented at a date certain.

Board Exhibit 1, part 4 (emphasis added).

The transcripts of the Palestine representation hearing, and the exhibits introduced at that hearing, are in evidence in this proceeding. To the extent that this evidence pertains to Respondent's decision to implement a case–ready meat program at the Jacksonville store, I consider it *de novo*, and am not bound by the Acting Regional Director's interpretation. However, for the same reasons that the Acting Regional Director found the evidence unpersuasive, and for additional reasons, so do I.

The testimony and other evidence received at the Palestine representation hearing clearly has some probative value, but a number of considerations affect the weight it should be accorded. In considering how much weight to give this evidence, I take into account that the parties were not then litigating anything about the Jacksonville store and thus had no incentive to develop the record concerning Respondent's plans to implement the case–ready meat program in Jacksonville.

Additionally, it is appropriate to consider that I did not observe the witnesses while they testified at the Palestine representation hearing and thus cannot assess their credibility based on demeanor. For example, at the representation hearing, Respondent called one of its vice presidents, Bruce Peterson, to testify regarding the decision to change to case–ready meat. Respondent did not call Peterson to testify during the present proceeding. Thus, I have neither

the benefit of seeing him while he testified nor the benefit of cross–examination focused upon facts relevant to the Jacksonville store.

Still another factor causes me to doubt the evidence Respondent presented at the Palestine hearing. Although Respondent had ample opportunity to raise the case–ready meat program in the Jacksonville representation proceeding, it did not do so. Considering that Respondent has experienced and resourceful counsel, and considering that Respondent vigorously litigated the Jacksonville representation case at every step, it is difficult to believe that Respondent simply overlooked the argument that elimination of meatcutting made the Jacksonville unit inappropriate.

The Union contends that Respondent's failure to raise the case–ready meat issue during the Jacksonville representation proceeding constitutes a waiver. In my view, neither waiver nor estoppel principles fit this situation very comfortably. If the unit has become inappropriate because of some lawful action, Respondent's earlier silence on this issue changes nothing.

However, Respondent's silence on this issue does have evidentiary significance. In advancing its defense that the Jacksonville meat department unit is inappropriate, Respondent bears the burden of proving when it made a final decision that meatcutting there would cease. Respondent has a unique ability to offer evidence on this issue, because its own managers made the decision. Therefore, its failure to present detailed evidence detracts from its argument.

Respondent argues, in effect, that it did not have the ability to present such evidence during the representation proceeding. Thus, its post–hearing brief states:

> Because Wal–Mart's implementation of the case–ready program in the Jacksonville store was not complete until June and July of 2000, evidence of the actual implementation in Jacksonville obviously did not exist in January of 2000 when the unit determination hearing was conducted. Final implementation of the case–ready program in the Jacksonville store was not fully complete until the last week of July 2000, a little more than one week before the Board issued its August 9, 2000 certification order. As such, Wal–Mart was not required to present, nor could it have presented, this evidence at an earlier juncture in the *Jacksonville* case.

This argument strikes me as somewhat disingenuous, particularly in light of Respondent's contention that the unit became inappropriate when the decision was announced, not when it went into effect. To support that argument, Respondent must present facts concerning when it made a final decision, not facts about the implementation of that decision. Obviously, if Respondent already *had* made the decision, it could have presented evidence about it.

Respondent's failure to raise this matter explicitly during the Jacksonville representation proceeding strong suggests that Respondent did not make this decision as early as it claims. For all the reasons discussed above, I conclude that Respondent's evidence does not carry its burden of proof.

For clarity, a distinction should be drawn between Respondent's decision to convert *eventually* to a case–ready meat system at all its stores, and its decision to implement the case–

ready meat program *at the Jacksonville store* on a particular date. Respondent has a large number of stores and enjoyed considerable flexibility in picking which stores would be converted to case–ready meat on particular dates certain. To support its defense, Respondent needed to establish the date on which it made a firm decision that the *Jacksonville* store would eliminate meatcutting. Credible evidence fails to support Respondent's claim that it made this decision on or before February 28, 2000.

Indeed, even assuming for the sake of analysis that it made the decision on February 28, 2000 – the date it disclosed the case–ready program during the Palestine representation hearing – at that point the Union *already* enjoyed majority support and Respondent *already* had an obligation to bargain, upon request, concerning the effects of that decision. Accordingly, I reject Respondent's defense that it had decided to eliminate meatcutting at the Jacksonville store before it had any obligation to negotiate with the Union.

Instead, I find that as of March 13, 2000, when the Union made its bargaining demand, Respondent had not yet decided when, if ever, it would eliminate meatcutting at the Jacksonville facility. Therefore, the meat department unit remained appropriate at that time and Respondent's refusal to bargain violated Section 8(a)(5) and (1) of the Act.

Respondent further contends that it had no duty to bargain over the effects of its decision to eliminate meatcutting because this change had no "demonstrably adverse effect on employees in the unit." To require effects bargaining, Respondent argues, a change must result in a significant detriment to employees in the unit and not merely in a change in job duties.

Respondent's argument carries not a little irony. On the one hand, Respondent asserts that the elimination of meatcutting had no demonstrable adverse effect on employees and caused them no significant detriment. On the other hand, Respondent also contends that this same change affected its operations so profoundly it renders a Board certification invalid and leaves employees without the union representation they selected.

Respondent's own internal documents recognize that employees affected by this change would be concerned about their careers. Previously, employees with meatcutting skills could be confident of relatively high wage rates within the store, but Respondent's elimination of meatcutting devalued those skills. Even though Respondent assured employees that there would be no pay cuts, such assurances fall short of a guarantee that these highly paid employees would receive future wage increases when all other store employees did. The absence of future wage increases, coupled with the effects of inflation, constitute a very demonstrable adverse effect.

In concluding that the elimination ofmeatcutting had a material substantial and significant effect on employees whose job titles changed from "meat processor" to "sales associate," I note particularly that the elimination of work requiring their special skills greatly affected both job satisfaction and future earning potential. By analogy, if judges could no longer decide cases or write decisions it would constitute a very material, substantial and significant diminution even if they received the same pay for doing word processing.

Although this analogy is extreme, it illustrates that the term "conditions of employment" includes more than the dollar value of a paycheck. Individuals also seek and continue particular employment which rewards them with opportunities to develop and maintain marketable skills.

In sum, I find that Respondent's plan to eliminate meatcutting did have a demonstrable adverse effect on employees who performed that work. Therefore, I reject Respondent's argument that it has no duty to bargain over effects because there have been no such effects.

Respondent further contends that the effects of its decision are so intimately intertwined with the decision itself that bargaining over the effects necessarily would entail bargaining over the decision. The facts do not support this argument.

As noted above, one significant effect of Respondent's plan involves the devaluing of the meat processors' cutting skills and the consequent reduction of their earning potential. During effects bargaining, the Union might address this problem in a number of ways. For example, it might seek contract language assuring that employees previously classified as meat processors would continue to receive the same percentage wage increase given to other employees. Or, it might try to negotiate a retraining program so that meat processors could learn new skills. Or it might propose an outplacement program to help employees find jobs with other employers which still needed meatcutters.

Rejecting Respondent's defenses, I conclude that it violated Section 8(a)(5) and (1) of the Act on March 14, 2000 when it refused the Union's bargaining demand.

The question then arises, how long did Respondent continue to breach its bargaining duty? Did it have an obligation to bargain on June 20, 2000, when the Union made a second request? Did it have a bargaining duty on July 18, 2000, when the Union made a third request?

Clearly, the duty to engage in effects bargaining continues. The situation is analogous to that of an employer which closes a plant and has a duty to bargain over the effects of that decision. Such an employer cannot escape the duty to engage in effects bargaining simply by saying, "No one works here anymore; the bargaining unit has disappeared." The employer still must negotiate with the union representing the employees who had been in the bargaining unit at the time of the plant closure.

Similarly, Respondent must bargain with the Union concerning the effects of the change to case–ready meat, even if the change made the bargaining unit inappropriate for future representation. Respondent remains in business and continues to employ the bargaining unit members. It must recognize and bargaining with the Union concerning the effects of implementing its case–ready meat program.

What about bargaining for other purposes? Did the elimination of meatcutting make the unit inappropriate, as Respondent claims, and thereby terminate Respondent's duty to bargain? If so, when did Respondent's duty to bargain end?

Before analyzing these questions, I must first consider whether the law permits me to consider them and if so, to what extent. As noted above, the Board's August 9, 2000

certification closed Case 16–RC–10168. Under longstanding precedent, issues the Board decided in that proceeding may not be relitigated in the absence of newly–discovered evidence or unusual circumstances. ***Pittsburgh Plate Glass Co. v. NLRB***, above; ***Super K Mart***, 322 NLRB 583 (1996); ***Nursing Center at Vineland***, 318 NLRB 901 (1995); ***Willow Ridge Living Center***, 318 NLRB 200 (1995).

Although the newly–discovered evidence exception does not apply, I believe that the "unusual circumstances" exception does. The General Counsel does not allege that Respondent violated the Act by eliminating meatcutting without first negotiating with the Union. Therefore, I will assume that Respondent acted lawfully. When an employer's lawful change calls into question the continued appropriateness of a bargaining unit, that certainly is an unusual circumstance.

In its post–hearing brief, the Union contends that the "unusual circumstances" exception arises only when the circumstances were outside the employer's control. It cites, as examples, a union's coercive threats of force, a union's sexual or racial discrimination against employees, and the issuance of subsequent Board or court decisions which would make continued certification inappropriate.

However, in the absence of any Board precedent to the contrary, I believe the "unusual circumstances" exception may also be applied appropriately when the unusual circumstances arise from an employer's *lawful* conduct. In the present case, the General Counsel does not contend that Respondent's conversion to a case–ready meat system violated the Act.

The Union disagrees with the General Counsel on this point and asserts that the elimination of meatcutting was itself an unlawful change. This argument will be discussed further below, but ultimately, I must reject it. The General Counsel, who initiated this proceeding by issuing a Complaint, continues to control the theory of the government's case, and a charging party does not have authority to alter that theory. Here, the Complaint does not allege that the change to case–ready meat was unlawful.

The Board may, in some circumstances, find and remedy a violation not alleged in the complaint, if the parties have fully litigated the issue at hearing. However, I do not conclude that the parties have fully litigated the issue, which is quite subtle, involving interpretation of the Supreme Court's holding in ***First National Maintenance Corp. v. NLRB***, 452 U.S. 666 (1981).

More specifically, the issue concerns whether the case–ready meat program, with its consequent elimination of meatcutting, constituted a change in the scope and direction of Respondent's enterprise "akin to the decision whether to be in business at all." Making such a change does not violate the Act because a change of this character is not a mandatory subject of collective bargaining.

On the other hand, the Board generally finds changes in work assignments and job duties to be mandatory subjects of collective bargaining. See, e.g., ***A.M.F. Bowling Co.***,303 NLRB 167 (1991). Determining how to characterize the change to case–ready meat – either as a change in the scope and direction of the enterprise or simply as a change in job duties – involves the resolution of a highly debatable issue.

Because the Complaint did not allege that the case–ready meat program itself violated the Act, the parties have not had the opportunity to litigate this issue with the thoroughness it requires. Therefore, I make no findings regarding whether the decision to convert fully to case–ready meat constitutes a mandatory subject of collective bargaining. However, in view of the position taken by the General Counsel, I will presume that Respondent acted lawfully when it made this decision.

If the decision to convert to case–ready meat were unlawful, it would not constitute a special or unusual circumstance creating an exception to the rule barring relitigation of representation case issues. Presuming the change to be lawful, I conclude that this circumstance is sufficiently special and unusual that the relitigation bar should not apply.

My conclusion that the "unusual circumstances" exception allows further litigation on the appropriate unit issue does not remove every barrier. The Board also has a longstanding "certification year" doctrine which creates a conclusive presumption that a labor organization continues to enjoy majority support within the unit for the first year after certification. **See, e.g, *Brooks v. Labor Board,*** 348 U.S. 96 (1954).

To be precise, this doctrine precludes challenging a union's majority status, rather than challenging the appropriateness of a bargaining unit. A challenge to the continued appropriateness of the unit is not, strictly speaking, the same as questioning whether a majority of employees in the unit still supported the union. For this reason, and also because of the unusual circumstances present in this case, I conclude that the "certification year" doctrine does not bar further litigation of the appropriate unit issue.

In considering whether the unit continued to be appropriate, I will begin by looking at how much the implementation of case–ready meat changed the way the meat department employees did their work. Based on the testimony of store manager McCall, which I credit, I find that before the implementation of case–ready meat (which McCall referred to as the "roll–out"), employees in the meat department included employees who cut the meat (called "meat processors" or "butchers"), employees who wrapped the meat, and employees who cleaned up the premises.

McCall testified that after the case–ready meat implementation, the processors, wrappers and clean–up people "became basically stockers where they would take product out of a box, a case that would come in, they would take the package out and put it on the shelf." This position is called sales associate.

When the Acting Regional Director issued the decision and director of election for the Jacksonville store, about 30 percent of meat sales came from boxed red meats. After the change, that percentage dropped to zero. No one in the store now has the title "meat processor" and no one in the store does any meat cutting. Additionally, employees no longer tenderize meat or grind hamburger.

There no longer are knives or cutting blocks in the meat cutting area. It is unclear whether the rank–and–file employees cut hams when a customer requests that service. At one

point in his testimony, McCall indicated that the sales associates were still supposed to slice hams on request, but at another point, McCall testified that if a customer asked for a ham to be sliced, he would assign a supervisor to perform that task because the saw used for such slicing is not easily accessible to employees and would have to be reassembled.

The change to case–ready meat did not require any employee to lose his or her job or suffer a pay decrease, and no employee was transferred out of the meat department. Additionally, no employee suffered a reduction in hours because of the change.

Meat department employees now spend most of their working time stocking the meat cases. They have to become familiar with the various cuts of meat to answer customer questions.

Before the "roll–out," a meat and deli manager supervised both these employees and those assigned to the delicatessen area. Implementation of the case–ready meat program resulted in abolition of the meat and deli manager's position. This meat and deli manager's title changed to "fresh assistant manager" but, according to McCall, this supervisor's job duties remained the same. This manager has authority over the seafood section as well as the meat market and delicatessen.

In sum, the shift to case–ready meat did not greatly alter most of the work performed by meat department employees. A March 17, 2000 letter to employees from Respondent's chief executive officer, Tom Coughlin, stressed the continuity of operations. After assuring employees that no one would be terminated or receive a pay cut because of the change, the letter continued:

> I want to be clear, despite union claims, Wal–Mart is not closing Meat Departments. When case–ready meat is implemented in your store, some responsibilities will change in the Meat/Deli Department. Your Store Manager will have a one–on–one discussion with every single Associate in the Meat/Deli Department to talk about the new responsibilities. We will still have Associates working in the Meat Department with a number of responsibilities including providing knowledgeable customer service. If you want to continue working in the Meat Department, we will let you do that. No Associate will be forced to transfer out of the Meat Department. Any changes in Meat Department staffing will be as a result of voluntary turnover and Associates desiring and accepting other offers outside the Meat Department.

The record does not contradict this letter from the Respondent's chief executive. No evidence indicates that the change to case–ready meat forced any employee to transfer out of the meat department or suffer a loss in pay. Because meat department employees still are doing most of what they did before the change, it is difficult, intuitively, to believe that the bargaining unit suddenly became inappropriate. The Union argues that it did not, stating in its post–hearing brief

> Contrary to Wal–Mart's characterization, the case–ready meat program did not eliminate this unit. Rather, the evidence shows that meat department employees continue to spend most of their time working in the meat market selling Wal–Mart's retail meat and poultry product line that no other store employees sell. In other words, this is not like the case where an employer completely ceases its entire operations or even closes an entire line of

> its business. Wal–Mart here simply changed how it conducts the same business in the same area with the same employees who worked in the unit the Board certified as appropriate.

Charging Party's Brief at page 3.

The Union's argument has considerable appeal. At heart, it asks a common–sense question: "So what's the big deal?" After all, the elimination of meatcutting affected only some of the duties of some of the unit employees, but otherwise life in the meat department has gone on pretty much as before.

Before the "roll–out" of case–ready meat, less than a third of red meat sales had involved meat cut at the store, so it is quite reasonable to wonder whether such a limited change should be able to destroy the appropriateness of the bargaining unit, thereby nullifying the choice made by the majority of unit employees. Because so much is at stake, Board precedents must be examined meticulously for guidance.

In ***Super K Mart***, 322 NLRB 583 (1996), the employer had reduced the amount of meatcutting but did not eliminate that function. The Board held that this reduction did not render the meat department unit inappropriate:

> Although the Board in ***Frito Lay, Inc.***, 177 NLRB 820 (1969), dismissed a refusal–to–bargain complaint and vacated a prior certification based on changed circumstances affecting the appropriateness of the unit, it did so because the "essential factor" upon which the Board had based its order and determination was eliminated due to the employer's reorganization of its operations—a reorganization which had been in the planning stage prior to the commencement of the representation proceeding. Here, the number of unit employees engaged in meat cutting was one of several factors considered by the Regional Director and Board in determining that a separate meat department unit was appropriate, and the Respondent has not contended that the current reduction in such employees is the result of a permanent reorganization of its operations, previously planned or otherwise. Rather, the Respondent merely contends that the number has "dwindled" since the certification.

322 NLRB at 583.

This language suggests that the Board will find that a change has rendered a previously appropriate unit inappropriate if all of the following conditions are satisfied: (1) The change eliminated the "essential factor" on which the Board based its earlier decision; (2) the reorganization had been in the planning stage before commencement of the representation proceeding; (3) the reorganization is permanent.

In her Decision and Direction of Election, the Acting Regional Director did not characterize meatcutting as an "essential" factor but did describe it as "critical." Specifically, she stated: "Critical to my determination are factors addressing the level and depth of meatcutting skills exercised by the Employer's meat processors and how these employees handle the boxed red meat that arrives in the meat department for eventual sale to customers."

For reasons which will be discussed further below, I conclude that this "critical" factor was also "essential," as the Board used that term in ***Super K Mart***. Therefore, I further conclude that the evidence in this case satisfies the first element of the *Super K Mart* analysis.

The second ***Super K Mart*** criterion does not, on its face, require an employer to have made a final decision about a contemplated change before the start of a representation proceeding. Rather, the language simply requires the change to be "in the planning stage" before the representation case began. Clearly, Respondent was planning the conversion to case–ready meat before the Union filed its representation petition. Therefore, I conclude that the evidence satisfies the second element of the ***Super K Mart*** analysis.

The present record clearly establishes that the change to case–ready meat was permanent. Indeed, the hearing in this case took place two years after the change and no evidence indicated that Respondent contemplated returning to the previous use of boxed meat, requiring meatcutting at the store. Thus, it appears that all three ***Super K Mart*** criteria have been satisfied.

Before reaching such a conclusion, however, I will return to the first criterion to consider further whether the meatcutting skills which were "critical" to the Acting Regional Director's decision were also an "essential factor" necessary to find a separate unit of meat department employees appropriate. That question presents some difficulty because the concept of an "essential factor," that is, a *prerequisite*, involves an analytical framework distinct from the "balancing of factors" approach used by the Acting Regional Director.

Deeming a factor to be essential, or a prerequisite, is different from assigning a particular weight to the factor. It is different even from saying that this one factor outweighs all the others combined. If an essential factor is absent, then no weighing need take place, because it could not affect the outcome.

The *Super K Mart* decision itself suggests that the amount of meatcutting work was not an *essential* factor, in the sense of a prerequisite. Thus, the Board stated that "Here, the number of unit employees engaged in meat cutting was *one of several factors considered* by the Regional Director and Board in determining that a separate meat department unit was appropriate. . ." (Emphasis added.)

Moreover, as discussed above, it is easy to imagine a hypothetical situation in which meat department employees work in such isolation from others, and under such different terms, that they would constitute an appropriate unit even in the absence of meatcutting. Therefore, it would appear logical to conclude that meatcutting skills are not an *essential* factor, in the sense of a prerequisite. Such a conclusion is particularly tempting because it avoids the tragic outcome of a stillborn bargaining unit, the sense that a group of employees trusted in the Board's procedures, obtained a majority in a unit that Board officials deemed appropriate, but ultimately achieved nothing.

Although technically, meatcutting may not be an "essential" factor, it is difficult to find a precedent in which the Board found a meat department unit appropriate when no meatcutting took place there. Meat cutting skills, even the limited amount necessary to complete the

processing of boxed meat, are considerably different, perhaps qualitatively different, from the skills exercised by other supermarket employees.

In ***Ray's Sentry***, 319 NLRB 724 (1995), the Board majority rejected the dissenting member's attempt to equate cake baking and donut frying with meatcutting skills. The majority found inappropriate a unit of bakery/deli employees even though some of the bakery employees mixed, baked and iced cakes and deli employees prepared various types of food. In a footnote, the Board majority responded to the arguments raised by the dissenter:

> Contrary to our dissenting colleague, the fact that the bakery/deli employees perform distinct job functions does not support a separate unit. These job functions do not, as our colleague concedes, require a high level of skill. Nor, as the facts here indicate, do the bakery/deli employees require any extensive training to perform their work. Lacking specialized skills and significant training, the bakery/deli employees are not sufficiently distinct from the other grocery employees who, like the bakery/deli employees, may perform a variety of distinct functions but who also lack special skills and training.
>
> 319 NLRB at 726, fn. 7.

It thus appears that for one department of a grocery store to constitute an appropriate unit, some of the employees must exercise skills at least as extensive as the skills of meat processors who convert boxed meat into the individual small cuts purchased by consumers. The Jacksonville store's meat department clearly does not meet this test. After the conversion to case–ready meat, the meat department required its employees to have even fewer specialized skills than the bakery/deli employees in ***Ray's Sentry***.

Although the record suggests that the meat department employees handled many different cuts of meat, employees in other store areas handled a large variety of products, as well. In essence, the Jacksonville store's meat department employees now do stocking. They must learn where in the meat case they should place different prepackaged cuts. That task does not require prolonged training, particularly considering that the packages bear identifying labels.

As a policy matter, it might be argued that the Board's appropriate unit standards evolved in an age of grocery stores rather than supercenters, and that today's 150,000 square foot store, employing hundreds of workers, bears less resemblance to a corner grocery than it does to *Deep Space 9*. However, the Board is well aware of changes in this industry and already has refined its analysis to take into account recent developments in the processing and merchandising of meat. See ***Scolari's Warehouse Markets***, above. The updated standards still place great importance on the presence of specialized skills.

For example, in ***Wal–Mart Stores, Inc.***, 328 NLRB 904 (1999), the Board listed a number of community–of–interest factors it considered in deciding whether a separate meat department unit would be appropriate. However, citing ***Scolari's Warehouse Markets***, it also pointedly stated as follows:

> In determining whether meat department associates share a distinct community of interest, the Board examines the actual work performed by the meatcutters to determine if

> the processing of boxed primal and subprimal meats involves "substantial meatcutting skills which are *distinct from the skills of other supermarket employees."*

328 NLRB at 904 (emphasis in original; footnote omitted).

Thus, Board precedent appears clear and compelling. In almost all case, absent meatcutting skills, a unit solely of meat department employees will not be found appropriate.

The Union, however, cites a different line of cases to argue that a meat department unit may remain appropriate even without meatcutting. The Union relies on *Sears, Roebuck and Co.*, 261 NLRB 245 (1982), in which the Board found appropriate a unit of employees in the store's automotive department. If this less–than–storewide unit is appropriate, the Union contends, then under the same analysis, a meat department unit also should be appropriate.

The Union also introduced into the record some regional directors' decisions citing and applying the *Sears* case. These cases include *Wal–Mart Stores, Inc.*, Case 6–RC–11844, in evidence as Charging Party's Exhibit 21. In that case, a regional director found appropriate a unit of Tire and Lube Express ("TLE") employees at a Wal–Mart store in New Castle, Pennsylvania. Significantly, the TLE department provided quite limited automotive services and therefore did not employ mechanics having the skill level of those in the *Sears* case. Instead, the TLE workers only had enough training to perform relatively simple tasks such as changing tires and oil.

The employer disputed the aptness of the *Sears* precedent, arguing that the Board had found an automotive department unit appropriate in *Sears* because it included a nucleus of skilled mechanical employees. The analogy to a meat department unit is clear: If skilled meatcutters are needed to make a meat department unit appropriate, then skilled mechanics would be needed to make a separate automotive unit appropriate. Noting that the employer had not cited any supporting precedents, the Regional Director rejected this argument:

> The Employer argues that the Board found the unit in *Sears* to be an appropriate unit because it included (in addition to five other job classifications) mechanics who performed the skilled mechanical work of engine tune–ups, front end alignments and brake overhauls. Contrary to the Employer's contention, the fact that the unit in the *Sears* case included mechanics was not the controlling factor; rather, the Board found that the automotive center employees as a whole had a sufficiently distinct community of interest to warrant their representation apart from the rest of the store.

Charging Party's Exhibit 21, at page 16.

It is not possible to determine how much the limited skills of the automotive employees contributed to the conclusion that a separate automotive department unit was appropriate. However, even the limited skills of changing tires, changing oil, and lubricating vehicles are significantly greater than the skills required of meat department employees after the change to case–ready meat.

Moreover, this automotive work is fundamentally different from that of sales associates. It involves specialized employees performing specialized tasks in a specialized environment. On

the other hand, an employee placing prepackaged meat in a refrigerated display case is doing essentially the same work as another employee keeping the ice cream freezer filled or still another employee stocking shelves with canned goods. For these reasons, I must reject the Union's argument.

The Union also asserts that by failing to raise its contemplated conversion to case–ready meat during the representation proceeding, Respondent waived its right to argue that this conversion made the unit inappropriate. However, the appropriateness of a unit does not depend on what evidence an employer presented or did not present during a representation hearing. It derives instead from the various circumstances of the employees in question. Therefore, I find the Union's waiver argument unpersuasive.

The Union also contends that Respondent cannot render the certified unit inappropriate by making the change to case–ready meat because, the Union argues, that change itself is unlawful.

> [B]ecause Wal–Mart continues to conduct the line of business of selling meat and poultry, this case is materially different from those holding that employers who terminate their operations or completely discontinue an entire line of business relieves them from their obligation to bargain because the employees who worked in the closed unit no longer work for the employer.

Charging Party's Brief at page 15. In essence, this argument seeks to distinguish *First National Maintenance* and, for reasons discussed above, I do not reach this issue because it has not been thoroughly litigated. Instead, in accordance with the General Counsel's theory of the case, I have presumed that Respondent acted lawfully when it decided to eliminate meatcutting and use only case–ready meat.

However, the Union's brief *appears* to raise another argument, namely, that Respondent had a duty to bargain over the *manner* of implementation. As the Union uses the term "manner of implementation," it appears to mean something distinct both from a duty to bargain over the decision to implement and from a duty to bargain over the effects of implementation. In other words, although the ***First National Maintenance*** decision made a distinction between bargaining over the decision itself (non–mandatory) and over the effects of that decision (mandatory), the Union would add a third category, a duty to bargain over the *implementation* of the decision. At least, the Union's brief seems to suggest such a distinction:

> And because it unlawfully refused to bargain over the *implementation* of the case–ready meat program, Wal–Mart may not interpose it as an affirmative defense to the refusal to bargain allegation. In short, Wal–Mart may not rely on an unlawful act as a defense to the charge of other unlawful conduct.

Charging Party's Brief at page 15. Later in the brief, the Union again alludes to a duty to bargain over the implementation of the case–ready meat program.

> . . .Wal–Mart was at the very least obligated to bargain over the manner in which it implemented the program at the Jacksonville store because the implementation occurred after the Jacksonville election, there's no record evidence that the switch involved either

> significant investment or withdrawal of capital, and the scope and ultimate direction of the meat market enterprise continued unchanged.

Charging Party's Brief at page 20. A footnote explains further what the Union meant by "implementation" bargaining:

> . . .Wal–Mart could have implemented the program in a way that would have removed any doubt about the continued appropriateness of the unit. For example, the parties could have agreed — as Kroger apparently did — that the knives, meatcutting and meat wrapping machines and equipment would remain, that employees would continue to receive training on handling knives and operating such machinery and equipment, and that they would continue to slice, cut, re–cut, re–work or re–wrap mislabeled case–ready meat, perform specialty cuts of case–ready meat, and grind scraps or case–ready meat in which case the meat market employees would still be performing skilled tasks requiring specialized training.

Charging Party's Brief, page 20, footnote 15.

Explained in this manner, "implementation" bargaining appears to be a subcategory of effects bargaining. If Respondent had satisfied its legal duty to bargain over the effects of the case–ready meat program, the Union contends, the parties might have reached an agreement preserving some job duties and thereby assuring that the unit remained appropriate.

This argument may be reformulated as follows: A claim of the unit's demise is premature. The unit cannot be presumed dead so long as Respondent's unlawful conduct prevents the life support efforts which might keep it alive.

The argument admits the possibility that someday the unit might become inappropriate if, after bargaining in good faith, the parties cannot agree on ways to keep it viable. Until that time, however, any difficulties with the unit must be attributed to Respondent's bad faith refusal to bargain about "implementation."

Notwithstanding the emotional attractiveness of this argument, it carries some logical problems. First, it assumes incorrectly that the appropriateness of the unit may be preserved by token meatcutting or the semblance of meatcutting. However, to be a significant factor in the community–of–interest analysis, meatcutting must also be a significant job duty.

Second, the contemplated "implementation" bargaining comes so close to decision bargaining that it is difficult to tell one from the other. If we assume that the Respondent is free to eliminate all meatcutting without first bargaining with the Union, it is inconsistent to add a requirement that Respondent must bargain about employees retaining a little bit of this work. A question sure to arise early in such bargaining is "how much meatcutting is a little bit?" Trying to resolve that issue places the Respondent's entire decision, or at least a primal cut of it, on the negotiating table.

It is true that Respondent unlawfully failed to recognize and bargain with the Union concerning the effects of its decision to sell only case–ready meat. It must do so. However, by definition, the duty to bargain over effects does not include a duty to bargain about the cause of these effects. Therefore, I must reject the Union's argument.

In its brief, the Union also contends that Respondent unlawfully accelerated its implementation of the case–ready meat program so that the program would be implemented first at the stores facing Union organizing drives. The Complaint does not allege such a violation.

Additionally, credible evidence fails to support the Union's claim. In its brief, the Union describes a large number of events and the dates on which they took place. It then argues that the sequence proves Respondent made decisions about the case–ready meat program in reaction to the Union's efforts.

Considering the numerous events, the Union's effort to find a pattern is a little bit like looking at the stars and grouping them into constellations. Such patterns do not reflect how the stars really relate to each other in space, but only the concepts of the observer.

Moreover, I discern no apparent causal pattern in the sequence of events. Absent some kind of credible corroborating evidence, I would not infer unlawful motivation from possibly coincidental events unless a significant number of them formed a constellation as obvious as Orion. The present record provides neither such a pattern nor any independent evidence to prove that Respondent manipulated the timing of events to obtain an advantage over the Union.

Because the record does not establish when Respondent's decision became final, I conclude that the Jacksonville meat department unit became inappropriate around July 15, 2000, when the transition to case–ready meat ended all meatcutting. Except for its duty to engage in the effects bargaining discussed above, Respondent's duty to recognize and bargain with the Union ceased as of that date. See *Frito Lay, Inc.*, 177 NLRB 820 (1969).

However, the Union asked the Employer to bargain at least twice before July 15, 2000. At that time, it enjoyed majority status and the Employer's failure to recognize and bargain with the Union constituted a violation of Section 8(a)(5) and (1).

On August 16, 2000, when the Union submitted its information request, Respondent no longer had a general duty to bargain. However, Respondent still had, and continues to have, the duty to bargain with the Union regarding the effects of its decision to discontinue meatcutting and sell only case–ready meat. The information which the Union requested on August 16, 2000 remains relevant to and necessary for this purpose.

The specific information requested is described in detail above, under the "Admitted Allegations" portion of this decision. All of this information is presumptively relevant because it relates directly to the wages, hours and working conditions of employees in the bargaining unit.

Most of the information requested, such as the names, job classifications and wage rates of unit employees, has such obvious relevance to the effects bargaining that no discussion is necessary. However, three paragraphs of the Union's information request – paragraphs (b), (c)

and (d) – may warrant further discussion. In those paragraphs, the Union sought the following information and documents:

> (b) Copies of all personnel policies and work rules that apply to bargaining unit employees;
>
> (c) Copies of all payroll and wage policies that apply to the bargaining unit employees;
>
> (d) Copies of all documents describing available fringe benefits, such as pension, profit sharing, 401(k) plans, vacation and health insurance that apply to the bargaining unit employees;

This information may be of significant use to the Union in formulating proposals to remedy the effects of Respondent's change to case–ready meat. The Union may seek, for example, to negotiate a retraining benefit for meatcutters affected by the change. The Union might also wish to bargain concerning the meatcutters' career opportunities within Respondent's organization. The Respondent's rules and policies clearly would be relevant to such negotiations.

Moreover, although the record does not suggest that Respondent has reduced any employee's present wage rate because of the change, it is reasonable to believe that the change will affect the future wage increases of the meatcutters, whose special skills no longer have the same value. Information concerning fringe benefits, such as 401(k) plans, obviously would be relevant to any discussion regarding the meatcutters' future earning potential.

Because Respondent has a continuing obligation to engage in effects bargaining, and because the requested information is relevant to such bargaining and necessary for that purpose, I conclude that Respondent's failure to furnish it violated, and continues to violate, Section 8(a)(5) and (1) of the Act.

Remedy

Because Respondent refused to recognize and bargain with the Union while the bargaining unit remained appropriate, it must take action to remedy this violation. This remedy should include posting the Notice to Employees attached to this decision as Appendix A.

Upon the Union's request, Respondent must also engage in bargaining concerning the effects of its change to case–ready meat at the Jacksonville store. Further, Respondent must furnish the information requested by the Union on August 16, 2000.

In a typical effects bargaining case, employees have been laid off because the employer closed a facility. See, e.g., ***Odebrecht Contractors of California, Inc.,*** 324 NLRB 396 (1997). In such a case, the Board orders the employer to pay backpay to the affected workers while the parties bargain concerning the effects of the change. ***Transmarine Navigation Corp.***, 170 NLRB 389 (1968).

Such a backpay requirement provides an incentive for the employer to engage in good faith bargaining because the longer it takes to reach agreement, the greater the backpay liability. As the Board frequently has stated when applying this *Transmarine* remedy, meaningful bargaining cannot be assured until some measure of bargaining power is restored to the Union. A bargaining order alone, therefore, is not an adequate remedy for the unfair labor practices committed. **See, e.g., *Baird Manufacturing Co.,*** 338 NLRB No. 71 (November 22, 2002); ***IHS at West Broward,*** 338 NLRB No. 25 (September 30, 2002).

Without a *Transmarine* backpay remedy, negotiating about the effects of a change already made has no more urgency than settlement negotiations in a case not docketed for trial; too easily, such discussions become a stalled car going nowhere. By imposing a continuing backpay obligation on the employer while negotiations take place, *Transmarine* transforms the stalled car into a taxicab with the meter running.

In the present case, however, a *Transmarine* backpay remedy would not be appropriate because Respondent's change to case–ready meat caused no layoffs, job losses or pay cuts. The Board would not require Respondent to pay some arbitrary amount of backpay because an arbitrary amount, unrelated to actual losses suffered, would be punitive rather than remedial.

Therefore, some other way must be found to restore a meaningful measure of bargaining power to the Union and thereby assure an adequate remedy. Under the unique facts of the present case, the most practical way to accomplish this goal would be to require restoration of the *status quo ante* while the effects negotiations take place. Doing so would not impose on Respondent any cost unrelated to the change which necessitated the effects bargaining.

Moreover, the actual costs of this remedy appear to be minimal. The record establishes, for example, that the meat saw, now dismantled, remains at the Jacksonville store. Requiring Respondent to put the saw back together and return it to the meat cutting area certainly does not impose an unreasonable burden.

Similarly, requiring Respondent to assign its meat processors the work of cutting about the same amount of meat as they did before the change costs Respondent little, because Respondent continues to pay these employees at the rates they earned before the change. On the other hand, restoration of the meat processors and saw to the cutting room would convey a powerful message to all employees that Respondent will not be allowed to disregard its duty to engage in effects bargaining.

The duty to maintain the *status quo ante* should begin and end in the same manner as would a duty to pay backpay in a typical *Transmarine* case involving the effects of a plant closing and layoff. More specifically, Respondent should be required to restore the *status quo ante* and promptly begin negotiating in good faith with the Union concerning the effects of its case–ready meat decision, if the Union requests such bargaining no later than 5 days after its counsel receives the Board's Decision and Order in this matter. Timeliness of such a request for bargaining should be computed in accordance with ***Melody Toyota***, 325 NLRB 846 (1998).

Once triggered by the Union's timely request to engage in bargaining, Respondent's duty to maintain the *status quo ante* should continue until the occurrence of the earliest of the following conditions:

(1) The date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its facility on its employees;

(2) A bona fide impasse in bargaining;

(3) The Union's failure to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union;

(4) Tthe Union's subsequent failure to bargain in good faith.

Cf. ***Young World Stores***, 321 NLRB No. 117 (July 22, 1996) [slip opinion not published in bound volume]; ***Inabon Asphalt, Inc.***, 325 NLRB No. 50 (February 6, 1998) [slip opinion not published in bound volume].

Conclusions of Law

1. Respondent Wal–Mart Stores, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Union, Local 455, United Food and Commercial Workers Union, Local 540, and the United Food and Commercial Workers International Union are labor organizations within the meaning of Section 2(5) of the Act.

3. During the period February 17, 2000 until about July 15, 2000, the following unit of employees at Respondent's store in Jacksonville, Texas, constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full–time and regular part–time employees employed in the meat market at the Employer's retail store located at 1311 S. Jackson Street, Jacksonville, Texas.

EXCLUDED: All other employees, including store managers, assistant managers, overnight managers, department managers, personnel managers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. The unit described in paragraph 3 above became inappropriate for collective bargaining on about July 15, 2000.

5. On February 17, 2000, United Food and Commercial Workers Union, Local 540 became the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of the employees in the unit described in paragraph 3, above. Notwithstanding that the collective–bargaining unit became inappropriate on about July 15, 2000 because of Respondent's decision to eliminate meatcutting and sell only case–ready meat, United Food and Commercial Workers

Union, Local 540 continues to be the bargaining unit's exclusive representative in negotiating with Respondent concerning the effects of this decision.

6. On about March 13, 2000, United Food and Commercial Workers Union, Local 540 demanded in writing that Respondent recognize and bargain with it concerning Respondent's decision to eliminate meatcutting and sell only prepackaged case–ready meat.

7. By letter dated June 20, 2000, United Food and Commercial Workers Union, Local 540 demanded that Respondent recognize and bargain with it concerning the terms and conditions of employment of the employees in the bargaining unit described in paragraph 3, above.

8. Beginning on or about March 14, 2000, and continuing to the present, Respondent has failed and refused to recognize and bargain with United Food and Commercial Workers Union, Local 540 as the exclusive representative of the employees of the unit described in paragraph 3 above.

9. On about July 18, 2000, by letter, United Food and Commercial Workers Union, Local 540 requested that Respondent furnish certain information, described more specifically in Complaint paragraph 13 and in the "Admitted Allegations" section of this decision.

10. The information described in paragraph 9, above, was relevant to collective bargaining concerning the effects of Respondent's decision to eliminate meatcutting and sell only prepackaged case–ready meat. It also was necessary for United Food and Commercial Workers Union, Local 540 to have this information to engage in such collective bargaining.

11. At all times since July 19, 2000, Respondent has failed and refused to furnish United Food and Commercial Workers Union, Local 540 with the information described in paragraph 10, above, thereby violating Section 8(a)(5) and (1) of the Act.

12. During the period March 14, 2000 to about July 15, 2000, Respondent's failure and refusal to recognize and bargain with United Food and Commercial Workers Union, Local 540 as the exclusive representative of the employees in the unit described in paragraph 3, above, violated Section 8(a)(5) and (1) of the Act.

13. Beginning March 14, 2000 and continuing to the present, Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with United Food and Commercial Workers Union, Local 540 concerning the effects of its decision to eliminate meatcutting and sell only case–ready meat.

14. The violations of Section 8(a)(5) and (1) described in paragraphs 11, 12 and 13, above, constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

15. Except for the violations described above, Respondent did not violate the Act in any manner alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[1]

ORDER

The Respondent, Wal–Mart Stores, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Failing and refusing to recognize United Food and Commercial Workers Union, Local 540, as the exclusive representative of the employees in the unit described in paragraph 3 of the Conclusions of Law, above, for purposes of bargaining concerning the effects of its decision to eliminate meatcutting and sell only case–ready meat at its Jacksonville, Texas store.

(b) Failing and refusing to provide information requested by the Union which is necessary for, and relevant to the Union's representation of employees during the negotiations referred to in subparagraph 1(a), above.

(c) Failing and refusing to recognize and bargain with United Food and Commercial Workers Local 540 while it is the exclusive representative of Respondent's employees in a unit appropriate for collective bargaining.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self–organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) For purposes of negotiating concerning the effects of Respondent's decision to discontinue meatcutting and sell only case–ready meat at its Jacksonville, Texas store, recognize and, upon request, bargain with United Food and Commercial Workers Union, Local 540, as the exclusive representative of the employees in the unit described in paragraph 3 of the Conclusions of Law, above.

(b) Immediately furnish United Food and Commercial Workers Union, Local 540, with the information it requested by letter dated July 18, 2000.

(c) Upon the timely request of United Food and Commercial Workers Union, Local 540 to engage in the bargaining described in paragraph 2(a) above, restore the meatcutting

[1] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

duties performed by meat processors in its Jacksonville, Texas store before the implementation of its decision to eliminate meatcutting and sell only case–ready meat. The request to engage in such bargaining will be timely if made within 5 days of the receipt of the Board's Decision and Order in this case by counsel representing United Food and Commercial Workers Union, Local 540. Respondent shall maintain such *status quo ante* until the occurrence of the earliest of the following conditions: (1) The date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith.

(b) Within 14 days after service by the Region, post at its facility in Jacksonville, Texas, copies of the attached notice marked "Appendix A."[2] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 14, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C.

Keltner W. Locke
Administrative Law Judge

[2] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read"POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board has found that we violated the Federal labor law. And has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT refuse to recognize and bargain with a labor organization which is the exclusive representative of our employees in a unit appropriate for collective bargaining.

WE WILL NOT refuse to bargain with United Food and Commercial Workers Union, Local 540, as the exclusive representative of employees in the meat department of our Jacksonville store, concerning the effects of our decision to discontinue meat cutting and sell only case–ready meat.

WE WILL NOT refuse to provide this Union with information it has requested which is relevant to and necessary for bargaining concerning the effects of our decision to discontinue meat cutting and sell only case–ready meat.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon timely request, recognize and bargain with United Food and Commercial Workers Union Local 540, as exclusive representative of the employees in our meat department, concerning the effects of our decision to discontinue meat cutting and sell only case–ready meat.

WE WILL, while this bargaining continues, restore the meat cutting functions which existed in our Jacksonville, Texas store before we implement our decision to discontinue meat cutting and sell only case–ready meat.

WE WILL promptly furnish United Food and Commercial Workers Union Local 540 with the information it requested in its July 18, 2000 letter.

WAL–MART STORES, INC.
(Employer)

Dated _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102–6178

(817) 978–2921, Hours: 9:15 a.m. to 5:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978–2925

APPENDIX B

TRANSCRIPT CORRECTIONS

Page	Line	From	To
202	10	Salaries	Solari's
215	4	prompted	promoted
225	9	professors	processors
232	17	of	off
284	21	polices	policies
287	8	Canter	Center
311	22	pet	cut
378	21	881	8(a)(1)
378	23	"Ms."	animus
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